Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

JUANA VARGAS-HARRISON,

Petitioner,

v.

RACINE UNIFIED SCHOOL DISTRICT, DENNIS McGOLDRICK, JOHN PELEJ, and PATRICIA STEPHENS-ROGERS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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92 pages

ISSUES PRESENTED

Apart from whether Appellant, the instructional leader and Principal of Knapp Elementary, speaking before the Board of Education's Curriculum Committee for the Racine School District was a policy-maker and whether her demotion as Principal was in conformance with the policy-making exception formulated in the cases of ***Elrod*** and ***Branti***, does the Seventh Circuit policy-maker corollary principle obviates the ***Pickering*** balancing? Did the District Court and the Seventh Circuit Court of Appeals misapply the policy-making exception consistent with ***Pickering v. Board of Education***, *391 U.S. 563, 888 S.Ct. 1731, 20 L.Ed.2d 811 (1968)*?

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OPINIONS BELOW

The Decision of the United States Court of Appeals for the Seventh Circuit, dated November 30, 2001 (272 F.3d 1964 (2001)) is set forth in Appendix 1a.

The Opinion of the United States District Court for the Eastern District of Wisconsin, dated February 9, 2001, is set forth in Appendix 17a.[123]

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. § 1254. The United States Court of Appeals for the Seventh Circuit issued its Decision in this case on November 30, 2001. Panel Rehearing and Rehearing en banc were timely requested. Rehearing was denied on March 25, 2002. This Petition was timely filed within the 90 of the Panel Rehearing denial, and is thus timely.

[1] The late Judge John Reynolds was the original trial judge. On February 11, 1999, Judge Reynolds denied a grant for Preliminary Injunction because it would have been too disruptive to remove the current Principal and then reinstate the Appellant. (App. 40a).

Judge Reynolds also applied the ***Pickering*** balancing (App. 36a-38a) and concluded that Appellant may well succeed at trial on her First Amendment claim.

[2] On May 22, 2000, Judge Reynolds further denied in part and granted in-part the Defendants' Motion for Summary Judgment. Because of failing health, the case was subsequently reassigned to Judge R. Randa. (App. 47a and 55a).

[3] The Honorable Judge Randa on a policy-making exception analysis contrary to Judge Reynolds' analysis ofapplying ***Pickering*** rescinded the Decision and Order of Judge Reynolds on February 9, 2001. (App. 1a and 15a).

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE

U.S. Constitution - First Amendment (Article 1)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1983 Civil Action for Deprivation of Rights.

Every person who under color of any statute, ordinance regulation, custom or usage of any state or territory of the District of Columbia, subjects or cause to be subjected any citizen of the United States or the persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities securred by the Constitution and laws, shall be liable to the parties injured in an action at law, suit and equity or other proper proceedings for redress.

STATEMENT OF THE CASE

This case was commenced by the Appellant's filing a Complaint on July 25, 1999, alleging that she was demoted because of the acts and conduct of the individual Defendants and the Racine Unified School District in violation of 42 U.S.C. 1983 for violating her First Amendment Rights of Free Speech.

A. Background Facts
The Parties

Dr. Juana Vargas-Harrison ("Appellant"), was Principal of Knapp Elementary School ("Knapp"). (R. 14) (R.

1)[4] The Racine Unified School District, ("The District"), is a public school district. (R. 14) (R. 1)

Defendant Dennis McGoldrick, ("McGoldrick"), was the Superintendent of the District and who had final policy and decision making authority relating to personnel matters. (R. 14) (R. 1) Defendant John Pelej, ("Pelej") was Deputy Superintendent of the District. (R. 14) (R. 1) Defendant Patricia Stephens-Rogers, ("Stephens-Rogers") was Director of School Operations/Staff Development. (R. 14) (R. 1)

Background for Pre-School to Grade Five Program -- P-5 Program

Wisconsin Statute 115.45 implemented a grant program call P-5 whereby the School Board, annually on or before September 15 of each year, on it on initiative or upon receipt of an application of a Principal of an elementary school located in the school district, may apply to the state Superintendent for a grant to be determined by the State Department of Public Instruction. (R. 14) (R. 1) (R. 13) Schools first started P-5 grants at the beginning of the 1986-87 school year. (R. 14) (R. 1) (R. 13) The P-5 program was designed to address the educational needs of economically disadvantaged elementary school students. Inner-city elementary schools enrolling large numbers of economically disadvantaged students may apply to receive annual state grants to develop innovative and successful supplementary educational services. (R. 14) (R. 1) (R. 13)

Gilbert Knapp Elementary School P-5 Proposal

Knapp's initial involvement in the P-5 program began in 1989-1990. (R. 14)(R. 1)(R. 15) Knapp had a current student population of 632 students; in the exceptional educational enrollment, there are 57 students. (R. 14)(R. 1) The ethnic make-up of the school population is 28.5%

[4] Plaintiff's Proposed Findings of Fact in Support of the Plaintiff's Motion for Preliminary Injunction. (R.14)

African-Americans, 13.6% Hispanic, and 57.9% Anglo/others. (R. 1) Enrollment information indicates that two-thirds of the kindergarten students receive some preschool experience. (R. 14)(R. 1) The poverty level was 61%; approximately 40.1% of the students qualify for free or reduced rate hot lunches. (R. 14)(R. 1)(R. 15)

Plaintiff's April 22, 1999 Presentation to the Curriculum and Instruction ("C&I") Committee

Appellant presented a proposal to the Racine District C&I Committee on April 22, 1999 entitled P-5 Proposals/School Effectiveness Plan Pre-Kindergarten to Grade Five Proposal 1999-2000. (R. 14)(R. 1)(R. 15) (Appellate Supp. App. 4) Appellant's program proposal suggested changes, from the previous proposal and in-part, the changes indicated that:

> "the Racine Unified School District and Knapp School need to do everything possible to give its children the finest education available. This means using current funding and assets in a way that gives the most economic, effective value per dollar. These actions can sometime demand painful but necessary decisions. The Following are the changes that are being proposed. These changes will free-up money that can be used to provide more Knapp students with innovative programs that will improve their learning process." (Knapp P-5 Proposal April 1999, pg. 14)
> (R. 14)(R. 1)(R. 15)

The teacher's union on April 22 had registered some major concerns regarding Appellant's proposal as presented; the executive director of the teacher's union, Mr. Ennis, did not support the proposal. (R. 14, 15) (Appellate Supp. App. 4)

The Fight to Change the April 22 P-5 Proposal

Arising from the April 22 meeting, the P-5 proposal was not approved by the Board and it was the belief by Defendant Pelej that the elements of collaboration amongst stakeholders of the building were missing and some remedy needed to be implemented so that when the proposal was resubmitted to the Board, that requirement (stakeholder collaboration) would be fulfilled.

A meeting occurred with the purpose of the meeting with Defendant Pelej, Mr. Fornal and Defendant Stephens-Rogers, to see if administration could accomplish the end that the Board was expecting and that would be a proposal being brought forward, that represented the input with collaboration of the stakeholders. (R. 14, 15)

It was Defendant Pelej's expectations that: (1) Appellant attend the meetings; (2) that she would have the opportunity to express her intentions, her leadership, and her goals for the school through this process. (R. 14, 15)

It was Defendant Pelej's expectation that Dr. Vargas-Harrison participate. (R. 14, 15)

Administration Concerns About Getting the P-5 Matter Resolved at the May 25 Meeting

Defendant Stephens-Rogers was directed to get the P-5 matter straightened-out and that the proposal process had to be done; Defendant Pelej expressed his concerns. (R. 14, 15)

It was Defendant Pelej who directed Defendant Stephens-Rogers to send the May 25 memorandum directing that Appellant attend the meeting. (R. 14, 15)

Defendant Pelej had instructed Defendant Stephens-Rogers to "get this matter cleaned-up and let's get this proposal through." (R. 14, 15)

Plaintiff's May 25 Presentation to the C&I Committee

On May 25, 1999 at 4:30 p.m., the Board C&I Committee had been rescheduled with an agenda item to approve the 1999-2000 P-5 proposal for Knapp as an agenda item. (R. 14)(R.1)(R. 15) Appellant did attend the May 25 C&I Committee meeting per the May 20 memorandum from Defendant Stephens-Rogers. (R. 14)(R. 1)(R. 5) She told the committee that several individuals, Jim Ennis, Judy Sommer, Barbara Bouldan, and a parent would present the proposal. (R. 14)(R. 1)(R. 15)

Post May 25 Conduct

On May 28, 1999, Appellant received a memorandum from Defendant Stephens-Rogers indicating that Defendant Pelej, the Deputy Superintendent, had scheduled a meeting for Tuesday, June 1 at 9:30 a.m. With respect to the June 1 meeting, it was Defendant Pelej who made the decision to schedule the meeting. It was Defendant Pelej who directed Defendant Stephens-Rogers to send the May 25 memorandum directing that Appellant attend the C&I meeting.

With respect to the April 22 proposal, Defendant Pelej had expressed concerns in the June 1 meeting as to why it was brought up again at the May 25 C&I meeting. (R. 14, 15) Defendant Pelej further indicated that in his eyes, she was insubordinate and told the Appellant something to the effect "I don't care if you can file something legally" in an angry and harsh manner. (R. 14) (R. 1) Comments were made to the effect that Appellant was insubordinate when she did not sign the proposal. (R. 14)(R. 1)(R. 15) Defendant Pelej directed Appellant that when the proposal went to the full Board that she should have offered her full support. (R. 14)(R. 1)(R. 15) While in the meeting, Appellant sought to leave the meeting to go to the rest-room, Defendant Pelej said something to the effect "you stay in here as long as we tell you to; you are employed by us; we can keep you in here as long as we want; you are paid by us." (R. 1)(R. 15)

The Demotion

Defendant Pelej spoke to McGoldrick about the content of what happened in the June 1 meeting; this occurred somewhere around June 2 or 3, 1999. (R. 14, 15)

McGoldrick contacted Jetha Pinkston-Lawson and directed that she make an offer of employment to Dan Theilen to become Principal at Knapp and replace Appellant. (R. 14, 15)

McGoldrick takes responsibility for making the decision to hire Principal Daniel Jerome Theilen. (R. 14, 15)

There was never a march of teachers going to the Superintendent saying something to the effect, "Look, we need to get Dr. Vargas-Harrison out of here." (R. 14, 15) No teachers went to McGoldrick to have Appellant removed. (R. 14, 15)

REASONS FOR GRANTING REVIEW

I. THE U.S. SEVENTH CIRCUIT COURT OF APPEALS' APPLICATION OF THE POLICY-MAKING EXCEPTION ATTEMPTS TO CARVE OUT A NEW PRINCIPLE AND THEORY FOR APPLYING *PICKERING* BALANCING.

A. The Seventh Circuit Policy-Maker Corollary Has Not Been Adopted By the U.S. Supreme Court

At issue in this case is the application of ***Pickering v. Board of Education***, *391 U.S. 563, 888 S.Ct. 1731, 20 L.Ed.2d 811 (1968)*; and ***Connick v. Myers***, *461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983)*.

To put this case in perspective, the Seventh Circuit Court of Appeals has recognized that when a governmental employee criticizes his government on a matter of public concern, while serving in a policy-maiking position, and suffers an adverse employment treatment based on speech, then the Court should follow ***Elrod v. Burns***, *427 U.S. 347,*

367-68, 96 S.Ct. 226 73, 49 L.Ed.2d 547 (1976). The Court expanded the ***Elrod*** exception in ***Branti v. Finkel***, *445 U.S. 507, 518, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980)* to extend beyond employees with policy-making input to any employee for whom "party affiliation is an appropriate requirement for the effective performance of the office involved." The Seventh Circuit has interpreted this definition to include "the individual authorized, either directly or indirectly, meaningful input into government decision-making on issues where there is room for principle disagreement on goals or their implementation." ***Warzon v. Drew***, *60 F.3d 1234, 1239 (7th Cir.1995).*

While Appellant, the Principal at an elementary school, spoke on how ethnic minorities and disadvantaged students educational plight should be improved, she did not fit neatly under ***Elrod*** and ***Branti***. The Seventh Circuit has proceeded on a road from the line of cases of ***Wilbur v. Mahan***, *3 F.3d 214 (7th Cir.1993)*; ***Nikolny v. Painter***, *653 F.2d 1164 (7th Cir.1981)*; and ***Warzon v. Drew***, *60 F.3d 1234, 1239 (7th Cir.1995)* to formulate what it now terms the "policy-maker corollary." Under this theory, the Seventh Circuit has exempted employers from the ***Pickering*** balancing analysis, even though they do not fit neatly within ***Elrod*** and ***Branti***. Appellant's speech here did not relate to anything political.

In ***Bonds v. Milwaukee County***, *207 F.3d 969 (2000)*, the Court noted that "the policy-making employee exception represents a subset of ***Pickering*** cases where the government interest so far outweighs the policy-making employee's interests that a categorical exception is appropriate." *See* ***Warzon***, *60 F.3d at 1238*; ***Marshall***, *32 F.3d at 1220*; ***Wilbur***, *3 F.3d at 218-19*; *citing* ***Bonds***, *207 F.3d 969 at 981.* The problem with this interpretation is a recognition by the Seventh Circuit that these line of cases is a subset of ***Pickering***. Yet, the Court in ***Vargas-Harrison*** did not apply ***Pickering***. It is for the Supreme Court to speak as the ultimate arbiter on this issue.

B. The Seventh Circuit Mischaracterization of the Facts

At the onset, it would be helpful to put Appellant's comments in some perspective. The Court of Appeals and the District Court sought to characterize Appellant's concerns about the P-5 program as though it was based upon a rejection of her proposal. ***Vargas-Harrison v. Racine Unified School District***, *272 F.3d 964 at 967.*

> Dismayed with the outcome of the meeting, Dr. Vargas-Harrison contacted her superior, Ms. Steven-Rogers and expressed frustration at the Union's reaction to the proposal. At the May 25, public meeting, Dr. Vargas-Harrison disregarded the advice of her superiors. After the new plan had been presented, Dr. Vargas-Harrison received permission to speak to those gathered at the meeting. She proceeded to emphasize the flaws in the new proposal. Once again, Dr. Vargas-Harrison distributed copies of her original plan and offered it as an alternative to the new proposal. She indicated that it was "time to let the principals do the job and stop the Union from running the schools." (R. 42 at 157). ***Vargas-Harrison v. Racine Unified School District*** *at 968.*

What Appellant said in part in the May 25 meeting is crucial to this analysis.

> We have a reading recovery program that is very expensive. I have talked to just a few first graders, from kindergarten through fifth grade. That this course is very low, as you can see, on this proposal. So what am I supposed to do?
> (Plaintiff-Appellant's Supplemental Appendix, p. 84)

Another thing that I added into this proposal was the safety of the school. Kids are fighting constantly. We need to do something with this. So in the community we have a Sergeant Foster who is a liaison, we discussed to perhaps put a committee together so he could chair this and help us out. Basically what it is in here is an assessment of what I had observed during the school year. It's up to you what you want to do with the building.
(Plaintiff-Appellant's Supplemental Appendix, p. 85)

DR. VARGAS-HARRISON: In the posted position it said computer background. I would imagine when the person applied and gets interviewed by human resources I'm pretty sure they will check on those particular requirements because that would be critical at Knapp.
(Plaintiff-Appellant's Supplemental Appendix, p. 95)

MS. VARGAS-HARRISON: I believe we have a guidance counselor on our staff. She is one of the most that – I believe she is one of the most experienced counselors in the district. She is the one that developed the guidance curriculum. We're fortunate to have her on our staff. So I think using her expertise in addition to the fact that I have an ISS person, at the same time they can communicate to the parents about the status when the student goes to ISS and what happened.
I think we have the resources established. Plus the fact that Knapp Elementary, where it's located, Knapp is a city accessible to transportation. It's a neighborhood school. It also – we're working with parents. The fact

> we have a police officer for those kids that have truancy, to deal with those issues for the guidance counselor.
> I would think in a school with no transportation, no way for the parents to take a bus, it's crucial to have these services.
> I'm trying in here to not – these people are hard working, very, very good people. Let's implement this money and use a program, a reading program to raise the scores. And in my proposal I explain, you know, pretty early what – what the recommendations are, but again the decision is for the committee.
> (Plaintiff-Appellant's Supplemental Appendix, p. 96-97)

> DR. VARGAS-HARRISON: With the present program we have the majority of the money goes to salaries of the two individuals plus the training we have to pay. I know the $66,000 is strictly devoted for materials and funding the program. Because the teachers would have Title 1 teachers, and the classroom teachers would be able to work with the student. So we'll say, then I will say benefits – in another words, this goes directly to the student.
> (Plaintiff-Appellant's Supplemental Appendix, p. 99)

Clearly, Appellant was speaking on matters of major public concern, the educating of low economic disadvantaged student. There should be a weighing of the importance of protecting her right to speak on this matter. In the case of Dr. Vargas-Harrison, the Court speculates about the impact of the Plaintiff's speech. At issue in this appeal is what level of evidence is needed to support whether the Appellant's speech represents disloyalty and whether it would be disruptive to the efficient operation of government - in this case, the running of Knapp Elementary School. As the Seventh Circuit Court of Appeals did in ***Bonds v.***

***Milwaukee County**, 207 F.3d 969 (2000)*; in ushering the policy-making employee exception, they assert that:

> The special loyalty and confidentiality needed from policy-making employees like Bonds exacerbate the damage to the employment relationship and government effectiveness caused by their subordinate disloyal or inappropriate speech.
> Majority Opinion Supra at 981 (Justice Cudahy Dissent)

The Seventh Circuit in this case, characterized Appellant as a policymaker. The Seventh Circuit suggests that it must decide whether this case falls within the ambit of this policy-maker corollary to the ***Pickering*** analysis. This inquiry requires that the Court determine whether Appellant occupied a policy-making position, *see **Warzon**, 60 F.3d at 1239*, and whether her speech was of the kind that falls within the corollary. *See **Bonds**, 207 F.3d at 979.*

Is the Court analysis faulty in determining whether Appellant was a policy-maker and whether her speech was of the kind that falls within the scope of the corollary?

C. Dr. Vargas-Harrison is Not the Type of Employee Compatible With Those Employees That the Seventh Circuit Has Relied Upon in Formulating Its Policy-Maker Corollary Principle

The Appellant - unlike all of the cases previously relied upon by the Seventh Circuit relating to the policy-making exception - dealt with a relationship between a direct elected official and a non-political employee.

In ***Warzon***, Warzon had received a specific directive from Milwaukee County Executive F. Thomas Ament, who directed Warzon to concentrate her efforts on solving the crisis in the administration health care plan. (Milwaukee County Executive F. Thomas Ament was an elected official.)

Further, there was a direct identification of the express policy issue that Plaintiff opposed. ***Warzon v. Drew***, 60 F.3d 1234, 1239 (7th Cir. 1995).

In ***Bonds v. Milwaukee County***, 207 F.3d 969, 977 (7th Cir. 2000), Plaintiff Bonds was to conduct research work for the County Board of Supervisors (elected officials) and he was interviewed by the Chairperson of the Board of Supervisors. It was two County Supervisors who voiced concerns about Bonds' employment (again, elected officials). ***Bonds v. Milwaukee County***, 207 F.3d 969, 974-975 (2000).

In ***Wilbur v. Mahan***, *3 F.3d 214 (7th Cir.1993)*, the free speech issue in question related to his direct relationship with the Defendant Mahan, the Sheriff (an elected official), and Wilbur, a deputy.

Appellant's speech does not relate in any way to a political entity or a political elected official. Appellant's position is far removed from any political elected officials. Why not in this case allow this question to go to the jury as to whether she is, in fact, a policy-maker, similar to what the Court did in ***Soderbeck v. Burnette County***, 752 F.2d 285, 288-289 (7th Cir. 1985)? Who was ***Warzon's*** superior? Who was ***Wilbur's*** superior? Who was the superior in ***Soderbeck***? Appellant's speech did not relate in any manner to an afront to a political elected official, body or entity.

D. The *Pickering* Analysis Should Have Been Followed

The Court of Appeals determined that Appellant was a policy-maker, while indicating that "we repeatedly have declined to decide whether a policy-maker may be terminated for speaking on any matter of public concern." The U.S. Supreme Court has never authorized this policy-making corollary principle. The Seventh Circuit indicated that the Courts must apply ***Pickering*** balancing, when the speech at issue does not implicate the employee's politics or substantive policy viewpoint. ***Bonds***, *207 F.3d at 979*.

The Court made a finding that:

> "in such a situation, the friction between a politically adverse policy-maker and superior poses such a potential disruption to the efficient functioning of government that a fact-specific inquiry is unnecessary." Similarly, we have determined that the policy-maker analysis applied to situations where a policy-making employee engages in speech critical of his superiors' work-related policy. ***Warzon***, *60 F.3d at 1239.*

The Seventh Circuit further makes a blanket-finding that when the policy-maker's speech creates a conflict with the policy stands of his superiors, the effect on government are "accute". ***Vargas-Harrison***, *272 F.3d 964 at 973.* This declaration should not be made without an ascertainment of the evidence. For example, in this case the evidence in the record is that there was never a march of teachers going to the Superintendent saying something to the effect, "Look, we need to get Dr. Vargas-Harrison out of here." No teacher went to the Superintendent to have Appellant removed. That evidence suggests that there was no mutiny at the school because of Appellant's speech or concerted disloyalty from her teachers and staff. There was no mutiny because of the speech. This case was brought on a Motion for Summary Judgment.

The net effect of this blanket principle by the Seventh Circuit does not allow for an analysis of the type of evidence that a ***Pickering*** analysis called for. While the corollary principle is a subset of ***Pickering***, the Seventh Circuit rationale that it is obviated is not the mandate of the U.S. Supreme Court to follow ***Pickering***.

In Justice Cudahy's dissent in ***Bonds***:

> This formulation should make it clear that the disagreement, in order to implicate the policy-making employee exception, must take a form from which a failure of loyalty and fidelity can reasonably be inferred as a strong possibility,

not a form from which such failure would be only a possibility - something to watch for in the future. ***Bonds***, *207 F.3d at 988.*

CONCLUSION

The Seventh Circuit has made a finding that when a principal, the presumptive instructional leader of a school, speaks about how state dollars are expended to educate low economic disadvantaged and minority students who are not performing academically, that that speech is unprotected and that categorizing a principal as a policy-maker protects the employer from liability.

What the Seventh Circuit Court of Appeals did was attmept to characterize the debate as a debate with the Appellant's superiors and a disgruntled union. The Seventh Circuit has said that the "policy-maker corollary does not apply, and the Court must apply ***Pickering*** balancing when the speech at issue does not implicate the employee's politics or substantive viewpoint." Citing ***Bonds***, *207 F.3d at 979* and ***Vargas-Harrison v. Racine Unified School District***, *272 F.3d 964, 973*. The speaking on a matter regarding the education of ethnic and minority children apparently, by this Court, implicates her political or substantive viewpoint.

The Court made a blanket finding that Appellant's speech falls within the contours of the policy-maker corollary. What Appellant did was that she advocated the use of P-5 funds from teacher's salaries to an alternative reading program. What she was also advocating here was that these dollars could be more effectively utilized and should be focused immediately on students. ***Vargas-Harrison v. Racine Unified School District***, *272 F.3d 964 at 974*. The Court ignored the fact that notwithstanding her speech, it did not create mutiny amongst the teachers. There was no factual evidentiary basis to support a finding that her speech created a conflict with the policy stance of her superiors and that the effect on government are accute.

Respectfully submitted,

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(Any footnotes trail the end of each document.)
No. 01-1440

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JUANA VARGAS-HARRISON,
Plaintiff-Appellant,

v.

RACINE UNIFIED SCHOOL DISTRICT, DENNIS McGOLDRICK, JOHN PELEJ, et al.,
Defendants-Appellees.

September 13, 2001, Argued

November 30, 2001, Decided

COUNSEL:
For JUANA VARGAS-HARRISON, Plaintiff - Appellant: Willie J. Nunnery, Madison, WI USA.

For RACINE UNIFIED SCHOOL DISTRICT, DENNIS MCGOLDRICK, JOHN PELEJ, PATRICIA STEPHENS-ROGERS, Defendants - Appellees: James R. Scott, LINDNER & MARSACK, Milwaukee, WI USA.

JUDGES:
Before RIPPLE, ROVNER and EVANS, Circuit Judges.

OPINIONBY:
RIPPLE

OPINION:

RIPPLE, Circuit Judge. Juana Vargas-Harrison filed this action against her employer, the Racine Unified School District ("School District"), alleging that the School District had violated her First Amendment rights when it demoted her for opposing publicly one of its policies. The complaint also

named the School District's Superintendent Dennis McGoldrick, Assistant Superintendent John Pelej, and Director of School Operations Patricia Stephens-Rogers (collectively "Administrators") as individual defendants to the suit. The district court entered summary judgment for the School District and its Administrators, finding that Ms. Vargas-Harrison occupied a policy-making position within the school system. The district court concluded that, because Ms. Vargas-Harrison was a policy-making employee who had engaged in speech critical of her superiors' policies, the School District could demote her without implicating her First Amendment rights. The district court also dismissed as moot Ms. Vargas-Harrison's pending motion to amend her complaint to include a procedural due process claim against the School District. For the reasons set forth in the following opinion, we affirm the judgment of the district court.

I

BACKGROUND

A. Facts

In the fall of 1998, Ms. Vargas-Harrison became the principal of Knapp Elementary, a grade school located in the Racine Unified School District. As the head administrator at Knapp, Ms. Vargas-Harrison evaluated the school's personnel, provided guidance in curriculum and instructional development, and implemented the policies of the Board of Education. In addition, the School District required each of its principals, including Ms. Vargas-Harrison, to spearhead the development of a P-5 grant proposal for his or her school.

The P-5 Program is a legislative program of the State of Wisconsin that offers financial aid to public schools serving disadvantaged children. For a school to receive this funding, the local school board, on its own initiative or by application of the principal, petitions the State for a P-5 grant. Although the proposal must detail how the school intends to spend the funds, Wisconsin does not mandate any particular use for the grant. To the contrary, each school has wide discretion in

crafting its own proposal. In the case of Knapp Elementary, this discretion fell to its principal, Ms. Vargas-Harrison.

On April 22, 1999, Ms. Vargas-Harrison presented her initial P-5 proposal to the School District's Curriculum and Instruction Committee ("Committee"). The proposal suggested using the P-5 grant to fund an alternative reading program. Ms. Vargas-Harrison's plan would mark a dramatic shift in the use of the funds because the proposal channeled money away from several teaching positions traditionally paid for by the grant. Confronted with the prospect of job cuts, the local teachers' union vehemently objected to Ms. Vargas-Harrison's proposal. Based on this opposition, the Committee did not approve Ms. Vargas-Harrison's plan.

Dismayed with the outcome of the meeting, Ms. Vargas-Harrison contacted her superior, Patricia Stephens-Rogers, and expressed frustration with the union's reaction to the proposal. However, Ms. Vargas-Harrison received little solace from the School District because it had been attempting to improve its relations with the union. Rather than supporting Ms. Vargas-Harrison's proposal, Stephens-Rogers directed Ms. Vargas-Harrison to collaborate with union officials in modifying the plan. Despite the admonition, Ms. Vargas-Harrison did not participate in the ongoing effort to recast Knapp's P-5 proposal. A group of parents and teachers, however, proceeded to cobble together a new plan without the assistance of Ms. Vargas-Harrison.

In the meantime, Ms. Vargas-Harrison continued to advocate her original plan. In particular, she sent a letter to the president of the local school board that detailed the deficiencies in the current use of the P-5 grant funds. As an alternative, she enclosed a copy of her rejected plan.

On May 25, 1999, a coalition of teachers and parents was scheduled to present their revised P-5 proposal to the Committee. The School District, however, recognized that Ms. Vargas-Harrison opposed the modification of her original plan. Therefore, on three separate occasions prior to the presentation, School District officials asked Ms. Vargas-Harrison to attend the meeting. Although the School District did not order her to participate in the presentation, its

officials believed that Ms. Vargas-Harrison's presence would indicate her support for the revised proposal. For her part, Ms. Vargas-Harrison understood that the School District wanted her to support the proposal even if she did not agree with it.

At the May 25 public meeting, Ms. Vargas-Harrison disregarded the advice of her superiors. After the new plan had been presented, Ms. Vargas-Harrison received permission to speak to those gathered at the meeting. She proceeded to emphasize the flaws in the new proposal. Once again, Ms. Vargas-Harrison distributed copies of her original plan and offered it as an alternative to the new proposal. She indicated it was "time to let the principal do the job and stop the union running the school." R.42 at 157.

Her stance was not well received by the School District. On two occasions, Ms. Vargas-Harrison met with School District officials concerning her conduct at the May presentation. Soon after these meetings, on June 18, 1999, the School District demoted her to the position of assistant principal at another institution. However, she would never serve in that position. Over the next seventeen months, Ms. Vargas-Harrison did not report to work; rather, she consumed her vacation days and various leave periods. After she had exhausted all possible excused absences and still had failed to return to her new position, the School District terminated her in January 2001.

B. District Court Proceedings

1.

On July 26, 1999, Ms. Vargas-Harrison filed suit against the School District and its Administrators, alleging that they had demoted her in retaliation for her public opposition to their preferred P-5 grant proposal. The district court denied Ms. Vargas-Harrison's initial request for a temporary restraining order that would have reinstated her as principal of Knapp Elementary. After a lengthy hearing, the district court also rejected Ms. Vargas-Harrison's motion for a preliminary injunction.

The School District and its Administrators then moved for summary judgment. They submitted that Ms.-Vargas-Harrison occupied a policy-making position within the school system. The School District argued that, because local school regulations unequivocally indicated that Knapp's principal had input into governmental decisionmaking, the court could resolve, as a matter of law, Ms. Vargas-Harrison's status as a policy-making employee. If Ms. Vargas-Harrison was a policy-maker, continued the School District, she owed her superiors a degree of loyalty with regard to job-related policy issues. The School District maintained that she had disregarded that duty when she criticized her superiors' preferred P-5 proposal. Because she was a policy-maker and because her May 25 speech involved a matter of educational policy, the School District contended that the First Amendment did not protect her May 25 speech. Consequently, in its view, the demotion of Ms. Vargas-Harrison was constitutionally permissible.

In the alternative, the Administrators sought to be dismissed from the case on qualified immunity grounds. They maintained that the law concerning the precise scope of the policy-maker analysis was unrefined at the time of Ms. Vargas-Harrison's dismissal. They contended that a reasonable school official would not have recognized that Ms. Vargas-Harrison's demotion violated the Constitution.

In opposing the motion for summary judgment, Ms. Vargas-Harrison maintained that the record did not support a finding that she occupied a policy-making position within the school system. She also submitted that the Administrators were not entitled to qualified immunity because they had violated her clearly established right to speak on matters of public concern.

Before the district court rendered a judgment on the motion, [n1] on January 18, 2001, the School District terminated Ms. Vargas-Harrison. It alleged that it had taken this action because Ms. Vargas-Harrison had not returned to work since her demotion eighteen months earlier. Ms. Vargas-Harrison, however, contended that the discharge gave rise to two new claims against the School District. Specifically, she

maintained that the termination had not only amounted to retaliatory discharge but had also violated her right to procedural due process. As such, she sought from the district court leave to amend her complaint to incorporate these new allegations.

2.

Before the district court addressed Ms. Vargas-Harrison's motion to amend her complaint, it entered summary judgment for the School District and its Administrators. The district court held that, as a matter of law, Ms. Vargas-Harrison was a policy-making employee who had advocated publicly positions in conflict with her superiors' job-related policy viewpoints. The School District therefore could demote and ultimately terminate Ms. Vargas-Harrison without impinging upon her First Amendment rights. In reaching its conclusions, the district court acknowledged that an individual's status as a policy-making employee generally poses a question of fact. However, because detailed regulations clearly delineated the duties and responsibilities of Knapp's principal, the district court determined that it could resolve the issue as a matter of law. The court also emphasized the discretion the School District had vested in Ms. Vargas-Harrison with regard to development of the P-5 proposal. In the view of the district court, these considerations permitted but one conclusion–Ms. Vargas-Harrison held a policy-making position within the School District and, because she was a policy-making employee, the School District could demote and ultimately terminate her for advocating stances in opposition to its stated policies.

The district court then turned to the two remaining aspects of the case. Although recognizing that its determination that Ms. Vargas-Harrison was a policy-maker disposed of the case, the district court nevertheless addressed the Administrators' claim of qualified immunity. The district court concluded that reasonable school officials would not have known that their demotion of Ms. Vargas-Harrison for opposition to their policies was unconstitutional. The court emphasized that the Administrators believed they

were demoting a policy-making employee. The district court found that, even if the Administrators were wrong in that conclusion, the case law concerning the scope of the policy-maker analysis was not refined in 1999; the Administrators would not have known that their demotion of Ms. Vargas-Harrison was unconstitutional. Finally, the district court briefly addressed Ms. Vargas-Harrison's motion to amend her complaint to include procedural due process and retaliatory discharge claims. Without elaboration, it dismissed the pending motion as moot.

II

DISCUSSION

A.

We review de novo the district court's grant of summary judgment. See Thomas v. Pearle Vision, Inc., 251 F.3d 1132, 1136 (7th Cir. 2001). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). The court's function is not to weigh the evidence but merely to determine if "there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). We must ask whether "there are genuine factual issues that can properly be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Id. at 250. In assessing whether a genuine issue of material fact exists, we must construe all facts and draw all reasonable inferences in the light most favorable to the nonmoving party. See id. at 255; Basith v. Cook County, 241 F.3d 919, 926 (7th Cir. 2001).

B.

We must determine whether the district court properly characterized Ms. Vargas-Harrison as a policy-maker and whether, as a matter of law, the School District's action violated her rights under the First Amendment.

As a general rule, the government cannot retaliate against its employees for engaging in constitutionally protected speech. See, e.g., Myers v. Hasara, 226 F.3d 821 (7th Cir. 2001). An employee may bring suit to vindicate his First Amendment rights provided two elements are present. The plaintiff must demonstrate that he engaged in speech protected by the First Amendment. See Horwitz v. Board of Educ. of Avoca Sch. Dist. No. 37, 260 F.3d 602, 618 (7th Cir. 2001); Ryan v. Ill. Dep't of Children & Family Servs., 185 F.3d 751, 758 (7th Cir. 1999). In addition, the employee must show his speech was "a substantial or motivating factor in the defendant's challenged actions." Horwitz, 260 F.3d at 618; see also Ryan, 185 F.3d at 758. Failure to satisfy either element of the inquiry will prove fatal to the employee's claim. In this case, we must focus on the first prong of this inquiry.

It is well-established in our jurisprudence that a public employee does not shed his First Amendment rights at the steps of the government building. See Pickering v. Board of Educ., 391 U.S. 563, 568, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968). It is equally well-established, however, that a government employee does not enjoy unlimited freedom of expression with respect to matters that relate to official responsibilities. In Pickering, the Supreme Court of the United States set forth an approach designed to strike an appropriate balance between the rights of the government employee as a private individual with freedom of expression and the need of government to conduct its affairs effectively and efficiently. Pickering requires that we ask (1) whether the public employee spoke on a matter of public concern; and (2) whether "the interests of the [employee], as a citizen, in commenting upon matters of public concern" outweigh "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering, 391 U.S. at 568. The second prong of this inquiry, known as Pickering balancing, requires that we engage in a seven factor analysis, weighing the respective

interests of the government and its employee, to determine if the First Amendment protects the speech at issue. [n2] See Kokkinis v. Ivkovich, 185 F.3d 840, 845 (7th Cir. 1999). However, drawing from the principles established in the closely analogous area of patronage cases, [n3] we have recognized that the First Amendment does not prohibit the discharge of a policy-making employee when that individual has engaged in speech on a matter of public concern in a manner that is critical of superiors or their stated policies. See Warzon v. Drew, 60 F.3d 1234, 1239 (7th Cir. 1995); Wilbur v. Mahan, 3 F.3d 214, 219 (7th Cir. 1993). In essence, we have determined that, with respect to these employees, the Pickering analysis regularly will result in a determination that "the government employer's need for political allegiance from its policymaking employee outweighs the employee's freedom of expression to such a degree that it obviates Pickering balancing." Bonds v. Milwaukee County, 207 F.3d 969, 977 (7th Cir. 2000). Consequently, there is no need for a fact-specific analysis of the circumstances of each case:

> Legal proofs are not the only source of knowledge and decision. Categorical judgments based on experience and common sense play an important role in all areas of law. The exception recognized in the patronage cases for sensitive employees rests on such judgments and it retains its force in cases that have nothing directly to do with patronage or party affiliation. An elected official is entitled to insist on the loyalty of his policymaking subordinates . . . . It would be a strange rule that gave more job protection to policymaking employees who vociferously attack their superiors than to policymaking employees who do their best to serve those superiors faithfully but have the misfortune to belong to the wrong party. It would give policymaking employees and other sensitive employees an incentive to attack their bosses in order to retain their jobs.

Wilbur, 3 F.3d at 218-19.

C.

We next must decide whether this case falls within the ambit of this policy-maker corollary to the Pickering analysis. This inquiry requires that we determine whether Ms. Vargas-Harrison occupied a policy-making position, see Warzon, 60 F.3d at 1239, and whether her speech was of the kind that falls within the scope of the corollary. See Bonds, 207 F.3d at 979.

1.

A policy-making employee is one whose position "authorizes, either directly or indirectly, meaningful input into government decisionmaking on issues where there is room for principled disagreement on goals or their implementation." Nekolny v. Painter, 653 F.2d 1164, 1170 (7th Cir. 1981). In applying this criterion, however, it is necessary to "go beyond labels to consider the nature of the responsibilities in question." See Pleva v. Norquist, 195 F.3d 905, 912 (7th Cir. 1999) (internal quotation marks omitted). Simply put, an individual's job title will not decide her fate as a policy-making employee; rather, the actual duties of the position must be examined and evaluated. Because the unique characteristics of a job will often influence this determination, an individual's status as a policy-making employee frequently poses a fact question. See Soderbeck v. Burnett County, 752 F.2d 285, 288-89 (7th Cir. 1985). However, when the duties and responsibilities of a particular position are clearly defined by law and regulations, a court may resolve this issue without the aid of a finder of fact. See Pleva, 195 F.3d at 912.

Our decision in Warzon provides guidance on the application of this standard. In Warzon, the plaintiff, Maureen Warzon, served as the controller of Milwaukee County's Department of Administration–a position that entailed management of the entity's health care plan. See Warzon, 60 F.3d at 1235. At the time she took over the position, the plan was in crisis because it confronted severe budgetary shortfalls. See id. Warzon, at the request of her superiors, developed an initiative to improve the health system's financial situation. See id. However, her superiors rejected

her idea and pursued other remedies. See id. at 1236. When Warzon publicly criticized her superiors' preferred methods for reforming the health system, she was terminated. See id. at 1236-37. In rejecting her First Amendment claim, we determined that Warzon served as a policy-making employee of Milwaukee County. See id. at 1240. We emphasized that Warzon's position entailed more than ministerial duties. See id. The plaintiff admitted that she was empowered to make recommendations concerning the plan including the development of new "policies and procedures" to improve the system. See id. at 1239. Although her superiors ultimately dismissed her recommendation, we stated that "the relevant inquiry is input, not control." See id. at 1240.

Turning to the facts of this case, we first note that no factual dispute exists concerning Ms. Vargas-Harrison's duties and responsibilities as principal at Knapp Elementary. To the contrary, School District regulations provide considerable insight into her status as a policy-making employee. In particular, District Policy 2213 delineates the role Ms. Vargas-Harrison held within the School District. As principal, Ms. Vargas-Harrison served as the highest ranking school official at Knapp Elementary. In this position, she exercised discretion over the organizational structure of her school. She assisted in the selection, supervision and evaluation of the faculty at Knapp. The responsibility for leading the development of curriculum and instruction fell to her. These duties, in themselves, are far from ministerial.

Another aspect of her job also indicates that Ms. Vargas-Harrison had meaningful input into government decisionmaking on issues where there is room for principled disagreement. The development of the P-5 proposal indicates the scope of Ms. Vargas-Harrison's decisionmaking responsibilities. The School District assigned Ms. Vargas-Harrison the task of creating a P-5 proposal for Knapp Elementary. The statutory scheme behind the P-5 program provided each school with wide discretion in developing a grant proposal to fit its particular needs. Ms. Vargas-Harrison used that discretion to its fullest–discarding Knapp's traditional use of the funds in favor of an innovative exploitation of the grant. Although her superiors ultimately

rejected the proposal, "the relevant inquiry is" whether she had "input, not control." Warzon, 60 F.3d at 1239. Ms. Vargas-Harrison's well-defined duties as principal at Knapp lead to one conclusion–she had significant input into government decisionmaking. We therefore conclude that she occupied a policy-making position within the School District.

2.

Although Ms. Vargas-Harrison's responsibilities fit the definition of a policy-maker, the question still remains whether she engaged in the type of speech that triggers this corollary to the Pickering analysis. We repeatedly have declined to decide whether a policy-maker may be terminated for speaking on any matter of public concern. See Bonds, 207 F.3d at 979; Ryan, 185 F.3d at 759; Warzon, 60 F.3d at 1239 n.1; Wilbur, 3 F.3d at 214. However, we have said that the policy-maker corollary "does not apply, and the courts must apply Pickering balancing, when the speech at issue does not implicate the employee's politics or substantive policy viewpoints." [n4] Bonds, 207 F.3d at 979.

This reluctance to cast the policy-maker corollary in sweeping terms stems from the rationale underlying it. As we noted earlier, the corollary is a shorthand for the Pickering balancing; in certain instances, "the government employer's need for political allegiance from its policymaking employee outweighs the employee's freedom of expression to such a degree" that the fact-specific Pickering inquiry is not required. Bonds, 207 F.3d at 977.

Therefore, we have concluded that this corollary applies when a policy-making employee engages in speech that implicates his political viewpoints. See Wilbur, 3 F.3d at 217-18. In such a situation, the friction between a politically adverse policy-maker and superior poses such a potential disruption to the efficient functioning of government that a fact-specific inquiry is unnecessary. Similarly, we have determined that the policy-maker analysis applies to situations where a policy-making employee engages in speech critical of his superiors' work-related policies. See Warzon, 60 F.3d at 1239. When the policy-maker's speech

creates a conflict with the policy stance of his superiors, the effects on government are "acute." See id. By contrast, when the employee's speech addresses matters that have no impact on his official duties, there is a diminished threat that this expression will hamper the government's performance of its functions. In these circumstances, the corollary does not apply, and courts must apply the fact-specific Pickering balancing test when the speech at issue does not implicate the employee's politics or substantive policy viewpoints. Bonds, 207 F.3d at 979. "Speech unrelated to job duties or political viewpoint runs too remote from interests that animate the exception." Id.

Turning to the facts of this case, Ms. Vargas-Harrison's speech falls within the contours of the policy-maker corollary. Ms. Vargas-Harrison's speech on May 25 unequivocally concerned work-related policies. Ms. Vargas-Harrison advocated shifting the use of the P-5 funds from teachers' salaries to an alternative reading program. This stance placed her in square opposition to the stated goals and policies of her superiors. The School District's need for allegiance from Ms. Vargas-Harrison during the creation of the P-5 proposal was acute. The union's vehement opposition to Ms. Vargas-Harrison's proposal boded poorly for labor relations in the School District. The Committee's refusal to approve Ms. Vargas-Harrison's plan denied the School District much needed funding. This is the precise type of situation that implicates the policy-maker rule.

Accordingly, we hold that the district court correctly determined that Ms. Vargas-Harrison's opposition to the School District's efforts to secure approval of its P-5 program was not protected speech. As a policy-maker in the School District, she owed her superiors a duty of loyalty with respect to this subject. The First Amendment does not protect her against discharge based on her opposition to the School District's proposal. [n5]

D.

Finally, we must address whether the district court properly dismissed as moot Ms. Vargas-Harrison's motion to amend her complaint. We conduct a de novo review of the district court's decision to dismiss as moot a motion to amend the complaint in light of the grant of summary judgment for the defendant. See Sanders v. Venture Stores, Inc., 56 F.3d 771, 773 (7th Cir. 1995). We are not bound by the rationale underlying the district court's determination. Rather, we may affirm the district court's judgment "on any ground that is supported in the record." Id. (citations omitted).

After her termination on January 18, 2001, the plaintiff sought leave to amend her complaint to include a procedural due process claim. She alleged, in the most conclusory manner, that her termination had deprived her of property without due process of law. In the course of dismissing her First Amendment count, the district court dismissed as moot all pending motions, including the motion to amend the complaint to include this due process claim.

Ms. Vargas-Harrison correctly notes that the district court's dismissal of a First Amendment case does not necessarily moot a procedural due process claim. However, we nevertheless must affirm the dismissal because an examination of the proposed amended complaint and the record of the earlier preliminary injunction hearing make clear that the amendment would have been futile. See Foman v. Davis, 371 U.S. 178, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962) (indicating leave to amend may be denied if new claim would be futile); Bethany Pharmacal Co., Inc. v. QVC, Inc., 241 F.3d 854, 861 (7th Cir. 2001); Payne v. Churchich, 161 F.3d 1030, 1036 (7th Cir. 1998).

A new claim is futile if it would not withstand a motion to dismiss. See Bower v. Jones, 978 F.2d 1004, 1008 (7th Cir. 1992). The proposed amended complaint recites no basis for the assertion that Ms. Vargas-Harrison has a property interest in her job. Notably, there is no allegation that she is a tenured employee and, at the hearing on the preliminary injunction in the district court, her counsel specifically noted that she was "a non-tenured employee, has no civil service protection."

R.42 at 205. The defendants noted this deficiency and the earlier admission by counsel in their brief and Ms. Vargas-Harrison has supplied no answer in her reply brief. Moreover, although Ms. Vargas-Harrison's proposed amended complaint is rather conclusory on this issue, it appears that the district court was correct in determining that, if a hearing had been held, she would have alleged the same retaliation claim that we hold non-meritorious today. As such, we hold that the district court's dismissal of Ms. Vargas-Harrison's motion to amend her complaint was appropriate.

Conclusion

Because Ms. Vargas-Harrison was a policy-making employee who had engaged in speech critical of her superiors' policies, we conclude that the School District's adverse employment action did not violate her First Amendment rights. We also conclude that the district court properly dismissed Ms. Vargas-Harrison's motion to amend her complaint. Accordingly, the judgment of the district court is affirmed.

AFFIRMED

Footnotes

n1 The district judge who presided over the initial phase of this litigation, including the hearing on the preliminary injunction, became ill before the conclusion of the case. The case therefore was assigned to another judge whose ruling is currently before us. The original district judge had denied the School District's and Administrators' motion for summary judgment. The new judge, upon assuming responsibility for the litigation, proceeded to reconsider the School District's motion for summary judgment. It was while the second judge had the motion under reconsideration that Ms. Vargas-Harrison was terminated.

n2 When conducting Pickering balancing, a court weighs the following seven factors:

(1) whether the statement would create problems in maintaining discipline by immediate supervisors or harmony among co-workers; (2) whether the employment relationship is one in which personal loyalty and confidence are necessary; (3) whether the speech impeded the employee's ability to perform her daily responsibilities; (4) the time, place, and manner of the speech; (5) the context in which the underlying dispute arose; (6) whether the matter was one on which debate was vital to informed decisionmaking; and (7) whether the speaker should be regarded as a member of the general public.

Kokkinis v. Ivkovich, 185 F.3d 840, 845 (7th Cir. 1999).

n3 See Warzon v. Drew, 60 F.3d 1234, 1238 (7th Cir. 1995) (collecting cases and secondary authorities on the relationship of the patronage dismissal cases to the Pickering balancing test).

n4 Similarly, speech critical of a superior's abuse of office does not come within the policy-maker analysis. See Bonds, 207 F.3d at 979.

n5 Because this conclusion disposes of Ms. Vargas-Harrison's First Amendment claims, we need not address the Administrators' claim of qualified immunity.

Case No. 99-C-0845

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JUANA VARGAS-HARRISON,
Plaintiff,

-vs-

RACINE UNIFIED SCHOOL DISTRICT,
DENNIS McGOLDRICK, JOHN PELEJ,
and PATRICIA STEPHENS-ROGERS,
Defendants.

Filed February 9, 2001

DECISION AND ORDER

This matter arises under 42 U.S.C. § 1983 ("Section 1983"). The plaintiff, Juana Vargas-Harrison ("Vargas-Harrison"), alleges that she was re-assigned from her position as principal of the Gilbert Knapp Elementary School in Racine, Wisconsin ("Knapp") to an assistant principal position at the Gilmore Middle School ("Gilmore"), and eventually

terminated from her employment,[1] in retaliation for exercising her free-speech rights under the First Amendment. Specifically, Vargas- Harrison claims that she was re-assigned and terminated for expressing views that were at odds with those of her superiors, the school board, and the local teachers' union concerning proper implementation of a state-funded program for economically-disadvantaged students (the "P-5 program").

Upon careful review of the entire record, the Court is left with a firm conviction that summary judgment should enter in favor of the Racine Unified School District ("School District"), and, on qualified immunity grounds, in favor of defendants Dennis McGoldrick ("McGoldrick"), John Pelej ("Pelej") and Patricia Stephens-Rogers ("Stephens-Rogers"). This compels the Court to revisit - and, to some extent, reverse - summary judgment rulings that were made by the Honorable John W. Reynolds, to whom this matter was previously assigned.

BACKGROUND

The facts giving rise to Vargas-Harrison's First Amendment claim are undisputed. Judge Reynolds, drawing upon the defendant's proposed factual findings, to which the plaintiff did not object, set forth the relevant facts in his Decision and Order of May 22, 2000 ("Reynolds Op."). They are incorporated here by reference. The procedural history of this matter, however, requires some elaboration.

The defendants filed a motion for summary judgment on February 23, 2000. On the basis of the undisputed facts, they argued that Vargas-Harrison was a "policymaker" and thus subject to re-assignment for expressing views on the P-5 program that were contrary to those of the educational establishment in Racine.[2] Judge Reynolds denied summary judgment to the extent it was sought on the basis of the "policymaker exception," finding that Vargas-Harrison's status as a "policymaker" was "not as clear cut as defendants would have it." Reynolds Op., p. 9. However, in the same

opinion, Judge Reynolds granted summary judgment in favor of the individual defendants (Vargas-Harrison's superiors) on the basis of qualified immunity. The plaintiff, Judge Reynolds noted, had failed to meet her burden of showing that these defendants violated her clearly established constitutional rights. Id., pp. 10-11.

Two days after Judge Reynolds' summary judgment ruling, and one day before a scheduled final pretrial conference, the plaintiff filed a motion seeking reconsideration of the qualified immunity issue. The defendants simultaneously filed a motion opposing the plaintiff's motion to reconsider. The following day, on May 25, 2000, the Court conducted a pretrial conference that lasted nearly three hours. Due to the medical condition of defendant Stephens-Rogers, the Court granted the parties' request for an adjournment of the trial date. Additionally, for reasons not reflected in the minutes of the conference, the Court vacated its May 22, 2000 order "with respect to the issue of qualified immunity" and decided to "hold decision" on that issue "until the conclusion of trial." In light of the adjournment, the Court reserved judgment on various evidentiary motions. These motions, which are still pending, concern a range of issues, including the admissibility of expert testimony, medical records, and evidence of the plaintiff's other lawsuits against former employers.

In mid-June of last year, Judge Reynolds declined to certify this case for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), as requested by the defendants. Order Dated June 1 7, 2000 Denying Defendants' Motion to Certify Case for Interlocutory Appeal ("Reynolds Op. II"), p. 3. He acknowledged that the facts were undisputed, but stated that the Court had been unable to "find that defendants were entitled to judgment as a matter of law for several reasons, including the insufficient development of the applicable legal principles." Id. Notwithstanding this statement, which would seem to undermine the proposition that the individual defendants violated the plaintiff's clearly established constitutional rights, Judge Reynolds emphasized that the

Court would stand by its decision to await the conclusion of trial before reaching the issue of qualified immunity. Id.

A conference before Magistrate Judge Goodstein in late July of last year failed to produce a settlement in this matter and, on November 2, 2000, the case was transferred to the undersigned District Judge. During a telephonic status conference in early December, counsel for the parties presented differing views of the procedural history and posture of this case. The waters were sufficiently murky that the Court solicited brief written submissions from the parties concerning the status of the case. The defendants, in their written submission, have echoed the argument they made during the status conference that "the holding of a decision [on qualified immunity] in abeyance until after the completion of trial presents an extraordinary situation and an outstanding issue before this Court." In effect, the defendants have again asked for a pre-trial ruling on the qualified immunity issue. This request has prompted the Court to take a second look at all of the dispositive issues raised by the defendants, including the core issue of whether Vargas-Harrison falls within the "policymaker exception."

ANALYSIS

I. Summary Judgment Standard

The standards governing motions for summary judgment are well established. Pursuant to Rule 56(c):

> summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law."

Celotex Corp. v. Catrett, 477 u.s. 317, 322 (1986) (quoting Fed. R. Civ. P. 56(c)).

"Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Id. at 327. It "can be a tool of great utility in removing factually insubstantial cases from crowded dockets, freeing courts' trial time for those that really do raise genuine issues of material fact." Mills v. First Federal Savings & Loan, 83 F.3d 833, 846 (7th Cir. 1996) (internal quotation omitted). Thus, "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. A genuine issue of fact is raised only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). In other words, "a judge faced with [a summary judgment motion] must decide . . . whether the state of the evidence is such that, if the case were tried tomorrow, the plaintiff would have a fair chance of obtaining a verdict. If not, the motion should be granted and the case dismissed." Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1572-73 (7th Cir. 1989) (citations omitted). Thus, a party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). "[A] party must produce 'specific facts showing that there remains a genuine issue for trial' and evidence 'significantly probative' as to any [material] fact claimed to be disputed." Branson v. Price River Coal Co., 853 F.2d 768, 771-72 (10th Cir. 1988).

II. Law of the Case

The current "law of the case," as it relates to the "policymaker exception" issue, is set forth in Judge Reynolds' Decision and Order of May 22, 2000. The law of the case doctrine "establishes a presumption that a ruling made at one

stage of a lawsuit will be adhered to throughout the suit." Avitia V. Metropolitan Club of Chicago, 49 F.3d 1 219, 1 227 (7th Cir. 1995) (citing Messinger v. Anderson, 225 U.S. 436, 444 (1912) (Holmes, J.)). "Unlike the doctrine of stare decisis, however, law of the case is a discretionary doctrine." Redfield v. Continental Casualty Corp., 818 F.2d 596, 605 (7th Cir.1987). "Justice Holmes established early on that 'the phrase, law of the case, . . . merely expresses the practice of courts generally to refuse to open what has been decided, not a limit to their power.' " Id. (quoting Messinger, 225 U.S. at 444). "[T]he doctrine is not a straightjacket. '[I]t is clear that all federal courts retain power to reconsider [issues] if they wish. Law of the case principles . . . are a matter of practice that rests on good sense and the desire to protect both court and parties against the burdens of repeated reargument by indefatigable diehards.' " United States v. Shannon, 94 F.3d 1065, 1076 (7th Cir. 1 996), vac 'd on other grounds on reh'g en banc, 110 F.3d 382 (7th Cir. 1997) (quoting Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE § 4478). While it is sometimes said that the law of the case has more "bite" when judges in one case are "changed in midstream", Williams v. C.I.R., 1 F.3d 502, 503 (7th Cir.1993), it has also been observed that "the only restraint upon a second judge in passing upon [an] interlocutory issue decided by another judge in-the same case is one of comity, . . . which in no way infringes upon the power of the second judge to act.' "AT&T v. Intrend Ropes & Twines, Inc., 944 F.Supp. 701, 707 (C.D.Ill.1996) (quoting Bowles v. Wilke, 175 F.2d 35, 37 (7th Cir.), cert. denied, 338 U.S. 861 (1949)). As in most discretionary matters, the question must be decided on a case-by-case basis:

> At bottom . . . a court is neither obligated nor foreclosed from reconsidering its prior decisions; instead, the principles underlying motions to reconsider and the law of the case doctrine must be meted out in the individual case to arrive at a proper exercise of the Court's discretion.

in re the August, 1993 Regular Grand Jury (Medical Corporation Subpoena), 854 F.Supp. 1403, 1406 (S.D. Ind.1994).

It is important to note that this case has not been brought to final judgment, nor has it been appealed. Indeed, Judge Reynolds declined to certify an interlocutory appeal under 28 U.S.C. § 1292(b). See In re Soybean Futures Litigation, 892 F.Supp. 1025, 1042 (N.D. Ill. 1995) ("the law of the case is most commonly invoked upon remand from an appellate ruling on a question of law"); Redfield, 818 F.2d at 605 ("the law of the case doctrine is most commonly applied to govern the conduct of litigation on remand after an appeal"). "In matters involving interlocutory orders, such as motions to dismiss, or matters that have not been taken to judgment or determined on appeal, the Seventh Circuit has made clear that the district courts have the discretion to reconsider the decisions at any time." Soybean Futures, 892 F.Supp. at 1042 (citing Cameo Convalescent Center, Inc. v. Percy, 800 F.2d 108, 110 (7th Cir.1986)). In short, while the law-of-the-case doctrine is not to be lightly disregarded, it has significantly less "bite" in situations such as this one, involving an interlocutory decision not yet reduced to final judgment or brought up on appeal. Jeanine B. v. Thompson, 967 F.Supp. 1104, 1109 (E.D. Wis. 1997).

Comity plays a substantial role in the exercise of the Court's discretion, but if a point is reached where the just, speedy, and inexpensive determination of an action can be secured, concerns of comity must yield. As discussed below, even if the plaintiff's "policymaker" status is deemed to be a factual question, the undisputed facts will not support a finding that Vargas-Harrison was anything other than a policymaker. Thus, it would clearly be wrong - and a waste of scarce judicial resources - to proceed to trial in this matter.

III. "Policymaker" Exception to First Amendment

In order to establish a claim of discharge in retaliation for exercising First Amendment rights, the plaintiff must show

that her speech was constitutionally protected and that the defendants retaliated against her because of that speech. Ryan v. Illinois Dept. of Children and Family Services, 185 F.3d 751, 758 (7th Cir. 1999). This case turns on whether Vargas-Harrison's statements concerning the P-5 program were constitutionally protected.[3] Generally, the First Amendment protects public employees from adverse job action based on political affiliation or viewpoint. Warzon v. Drew, 60 F.3d 1234, 1238 (7th Cir. 1995). However, the general rule has a "significant exception" for "policymakers," who may, consistent with the First Amendment, be dismissed for political reasons. Pleva v Norquist, 36 F.Supp.2d 839, 844 (E.D. Wis.), aff'd, 195 F.3d 905 (7th Cir. 1999). The idea behind the exception is that forcing elected officials to retain their political adversaries as policymakers or confidential advisors would unduly interfere with the operation of government and thwart the implementation of the elected officials' policies. Warzon, 60 F.3d at 1239. This concern, according to the Seventh Circuit, "cannot be confined to matters of party affiliation" (i.e., patronage cases) but extends also to disagreements concerning policy. Wilbur v. Mahan, 3 F.3d 214, 217-18 (7th Cir. 1993); Warzon, 60 F.3d at 1239. Indeed, the Court of Appeals recently observed that "disagreement between the employer-and the policymaking employee over job-related policy issues causes the same failure of loyalty and shared political mission between superior and subordinate as inconsistent political affiliation or viewpoint." Bonds v. Milwaukee County, 207 F.3d 969, 978 (7th Cir.), cert. denied, __ U.S. __, 121 S.Ct. 340 (2000) (emphasis added).[4]

The Seventh Circuit recognizes that "policymaking may occur at many levels" and holds that the test for whether an employee is a "policymaker" is "whether the position held by the individual authorizes, either directly or indirectly, meaningful input into government decisionmaking on issues where there is room for principled disagreement on goals or their implementation." Nekolny v. Painter, 653 F.2d 1164, 1170 (7th Cir. 1981), cert. denied, 455 U.S. 1021 (1982). In order to fall within the policymaker exception, the employee

need not have final policymaking authority, Id., but some courts have required that the employee's job entail "the type of discretion that can be used to thwart the . . . goals of the [employer]." Gannon v. Daley, 561 F.Supp. 1377, 1383 (N.D.Ill. 1983).

Judge Reynolds' analysis of the "policymaker" issue begins with the assertion that "[w]hether Vargas-Harrison is a 'policymaker' is a factual question." This is a correct, but incomplete, statement of the law in this circuit. Warzon, 60 F.3d at 1239; Soderbeck v. Burnett County, 752 F.2d 285, 289 (7th Cir.), cert. denied, 471 U.S. 1117 (1 985); see also Thulen v. Bausman, 938 F.2d 84, 85 n. 1 (7th Cir. 1991) (Ripple, J., dissenting from denial of rehearing en banc).[5] Although "the determination of status as a policymaker in many cases presents a difficult factual question," Nekolny, 653 F.2d at 11 69 (emphasis added), the determination can also be relatively straightforward. Indeed, under certain circumstances, it is not a factual question at all. For example, in Pleva, supra, Judge Gordon granted a motion to dismiss that was based on the plaintiff's status as a policymaker. Taking his cue from Seventh Circuit case law, Judge Gordon looked to the "powers inherent in [the plaintiff's] office," which were established by statute and local ordinance, and concluded that the plaintiff was a policymaker. Pleva, 36 F.Supp.2d at 845 (following Heck v. City of Freeport, 985 F.2d 305, 309 (7th Cir. 1993)); see also Tomczak v. Chicago, 765 F.2d 633, 640 (7th Cir. 1 985) ("powers inherent in a given office" determine policymaker status). Accordingly, he granted a motion to dismiss the plaintiff's First Amendment claims. Pleva, 36 F.Supp.2d at 845. On appeal, the Seventh Circuit affirmed, noting that in cases where "the duties and responsibilities of a particular position are clearly outlined by law," the court "may make the determination, as a matter of law, that a certain position involves policymaking." Pleva v. Norquist, 195 F.3d 905, 912 (7th Cir. 1999) (emphasis added). Thus, it is evident that the question of a plaintiff's policymaker status is not always for the jury to decide.

Judge Reynolds points out in his May 22, 2000 opinion that

"both the P-5 statute and the P-5 program overview from the State Superintendent of Public Instruction require school principals to play a strong leadership role in the P-5 process." See also Decision and Order Denying Plaintiff's Motion for a Preliminary Injunction (Nov. 11, 1999), pp. 3-6. There is no genuine dispute about this fact. As in Pleva, therefore, the plaintiff's position carried with it the authority to "make" policy in the sense of having "meaningful input." Judge Reynolds allowed for the possibility that the plaintiff was not making policy but "simply doing her duty" when she advocated her P-5 proposal. However, the fact that the plaintiff had little choice but to formulate policy did not make her any less a policymaker. An illustration from national politics may help to illuminate this principle. Secretary of State Colin Powell is required by statute to designate, annually, those states that sponsor international terrorism. 22 U.S.C. § 2656f. Since "terrorism" is a somewhat subjective term, this statutory directive calls for the exercise of judgment. However, if Secretary Powell were to include a close ally of the United States on the list, contrary to the wishes of President Bush, no one would suppose that he had a First Amendment right to do so. The same principle applies here, although there may be some reluctance to say so because Vargas-Harrison is an educator and not a political appointee. Where matters of policy are concerned, however, school principals, no less than members of the President's cabinet, must often "toe the line."

The Court has some sympathy for the plaintiff's predicament. On the one hand, she was required to exercise a "strong leadership role" in the development of the P-5 program. On the other, she had to please her superiors, including ultimately the elected school board, and, in the background, the union. Given the political power wielded by teachers' unions today, it took courage for Vargas-Harrison to say publicly, in advocating her views on the P-5 program, that it was "time to . . . stop the union running the school." Reynolds Op., p. 7. However, the subject matter of the disagreement between Vargas-Harrison and the defendants, so long as it was a matter "of public concern," is not all that important.

The Court's First Amendment analysis would be the same if Vargas-Harrison had opposed her superiors (and the union, presuming that it took the same position) on sex education, prayer in the classroom, or the teaching of evolution. What matters is the nature of the plaintiff's job and whether it afforded her "meaningful input" into the formulation of the disputed policy. It is clear that Vargas-Harrison, by statute and regulation, held a position that authorized "meaningful input into government decisionmaking on issues where there [was] room for principled disagreement on goals or their implementation." Nekolny, 653 F.2d at 1170. Thus, even if the defendants did reassign or terminate Vargas-Harrison for opposing them (and the union) on the P-5 program,[6] they did not violate her rights under the First Amendment. In other words, because Vargas-Harrison was a policymaking employee, her superiors could, consistent with the First Amendment, fire her "for advocating positions in conflict with their stated policies." Warzon, 60 F.3d at 1239.[7]

This case is similar to Warzon, a recent Seventh Circuit case that addressed the contours of the policymaking exception. Maureen Warzon was a Controller for the Milwaukee County Department of Administration ("Department"). She reported directly to the Director of the Department ("Director") and, ultimately, to the County Board of Supervisors ("Board"). As part of her job, Warzon hired an outside consultant to review the county's health care plan and make recommendations for improvement, especially in the area of cost containment. The consultant came back with certain recommendations, which Warzon openly supported because she believed they would save the county considerable amounts of money. The Board, initially receptive to the consultant's recommendations, later changed its mind. Warzon continued to advocate the consultant's program of changes long after the Board's change in position became known. Eventually, a letter from Warzon to the Director (again urging implementation of the consultant's recommendations) made its way into the Milwaukee Journal-Sentinel and Warzon was fired. The Seventh Circuit concluded that the position of Controller "obviously" had "meaningful input into government

decisionmaking" and, on that basis, upheld the trial court's dismissal of the case under Rule 12(c). Id. at 1239-40.

In this case, as in Warzon, the plaintiff's duties and responsibilities were more than "ministerial." Id. When the plaintiff developed and proposed changes to the P-5 program, she, like Maureen Warzon, found herself in a political thicket. Like Warzon, she claims to have suffered an adverse job action for openly disagreeing with her superiors' policy stance in a particular area. However, if the First Amendment does not protect Warzon's crusade to lower healthcare costs for Milwaukee County, it does not protect Vargas-Harrison's comments regarding the implementation of the P-5 program at Knapp.[8] In the end, the claims of Warzon and Vargas-Harrison fail for the same reason: both were policymakers who opposed their superiors on matters of policy.

IV. Qualified Immunity

The propriety of qualified immunity in a given case should be decided "as early as possible," in order to fulfill the policy objective of protecting public servants (in this case school administrators) from the burdens of litigation. Levenstein v. Salafsky, 164 F.3d 345, 347 (7th Cir. 1998); Ellis v. Wynalda, 999 F.2d 243, 245 (7th Cir. 1993). As noted previously, Judge Reynolds' statement that the "applicable legal principles" concerning the policymaker exception were "insufficiently develop[ed]" (Reynolds Op. II, p. 3) would seem to argue for immunity, since the individual defendants could only be found liable for money damages upon a finding that they violated "clearly-established" constitutional rights. Gregorich v. Lund, 54 F.3d 410, 413 (7th Cir. 1995) (citing Anderson v. Creighton, 483 U.S. 635 (1987)). Of course, because the Court has already determined that the plaintiff's speech concerning the P-5 program was not constitutionally protected, the individual defendants are necessarily immune from liability, at least as far as this Court is concerned. However, even if the Seventh Circuit takes a different view of the "policymaker exception" issue on appeal, the First Amendment claims against the individual defendants should still be subject to a

defense of qualified immunity.

Government officials who deprive an individual of constitutionally protected rights while acting under the color of state law are subject to personal liability for damages under Section 1983.[9] However, under the defense of qualified immunity, "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Supreme Video, Inc. v. Schauz, 808 F.Supp. 1380, 1388 (E.D.Wis.1992), rev'd in part on other grounds, 15 F.3d 1435 (7th Cir.1994) (quoting Harlow v. Fitzgerald, 457 U.s. 800, 807 (1982)). The defense of qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 339 (1986).

"While [qualified immunity] is a question of law, 'it is not answered in the abstract but in reference to the particular facts of the case.'" Supreme Video, 808 F.Supp. at 1388 (quoting Rakovich v. Wade, 850 F.2d 1180, 1202 (7th Cir.), cert. denied, 488 U.S. 968 (1988)); see also Mitchell v. Randolph, 215 F.3d 753, 755 (7th Cir. 2000). "Once the defendant's actions are defined or characterized according to the specific facts of the case this characterization is compared to the body of law existing at the time of the alleged violation to determine if constitutional, statutory, or case law shows that the now specifically defined actions violated the clearly established law." Rakovich, 850 F.2d at 1209. "It is the plaintiff who bears the burden of establishing the existence of the allegedly clearly established constitutional right." Id. The plaintiff "does not meet this burden by alleging the violation of broad constitutional rights . . [e.g., rights under the First Amendment] and then claiming that such rights are 'clearly established.' Supreme Video, 808 F.Supp. at 1388. "Rather, 'the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable

official would understand that what he is doing violates that right.' " Id. at 1388-89 (quoting Anderson, 483 U.S. at 640). "According to the Supreme Court, 'the state of the law is evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court...'" . . . Id. at 1389 (quoting Procunier v. Navarette, 434 U.S. 555, 565 (1978)). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful...." Anderson, 483 U.S. at 640, 107 S.Ct. 3034. Instead, "it is to say that in the light of pre-existing law the unlawfulness must be apparent." Id. In the First Amendment context, "government officials are not expected to be prescient and are not liable for damages simply because they legitimately but mistakenly believed that the balancing of interests tipped in the State's favor." Gregorich, 54 F.3d at 415.

As noted, the facts in this case are undisputed and the Court assumes, for purposes of its summary judgment analysis, see n. 6, supra, that there was a causal link between the plaintiff's position with respect to the P-5 program and her re-assignment/termination. The question is therefore whether Vargas-Harrison can meet her burden of showing that a reasonable school district official ought to have understood that the First Amendment forbad him from taking adverse job action against Vargas-Harrison as a form of reprisal for her stand on the P-5 program. To meet this burden, the plaintiff must come forward with case law that "closely corresponds to the contested action." Gregorich, 54 F.3d at 415 (citing Rakovich, 850 F.2d at 1205); Upton v. Thomas, 930 F.2d 1209, 1212 (7th Cir. 1991). Vargas-Harrison has failed to cite any cases that ought to have alerted the individual defendants that their response to Vargas-Harrison was unconstitutional.[10] If anything, the case law in existence at the time showed that someone in Vargas-Harrison's position could be the subject of adverse job action, without any affront to the First Amendment, because she had meaningful input concerning policy issues. See, e.g., Warzon, 60 F.3d 1234 (decided in 1995).

To summarize, qualified immunity is a "powerful shield that insulates officials from suit as long as their conduct does not violate a 'clearly established' constitutional right 'of which a reasonable person would have known." Gregorich, 54 F.3d at 413 (quoting Harlow, 457 U.S. at 818). Vargas-Harrison has not pierced that shield. The Court therefore concludes, as Judge Reynolds initially did, that McGoldrick, Pelej and Stephens-Rogers are immune from suit under Section 1983. Reynolds Op., pp. 10-11.

NOW, THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

1. Pursuant to Rule 56, judgment is entered in favor of the defendants; and
2. To the extent the Court's Decision and Order of May 22, 2000 is inconsistent with this order, it is VACATED; and

3. All pending motions are dismissed as moot.

Dated at Milwaukee, Wisconsin, this 9th day of February, 2001.

SO ORDERED,

HON. RUDOLPH T. RANDA
U.S. District Judge

Footnotes

[1] On January 29, 2001, the plaintiff filed a motion for leave to file an amended complaint. The amended pleading includes the allegation that Vargas-Harrison was discharged from her job on January 18, 2001 for the same reasons she was re-assigned to Gilmore.

[2] As discussed in more detail below, the speech of public employees does not enjoy unqualified First Amendment protection. The law recognizes an exception to the First Amendment for certain kinds of speech by "policymakers," i.e., individuals who have "meaningful input into government

decisionmaking on issues where there is room for principled disagreement on goals or their implementation." Bonds v. Milwaukee County, 207 F.3d 969, 977 (7th Cir.), cert. denied, __ U.S. __, 121 S.Ct. 340 (2000). Such individuals may, consistent with the First Amendment, be subjected to adverse job action for opposing their superiors on policy matters. Warzon v. Drew, 60 F.3d 1234, 1239 (7th Cir. 1995).

[3] See n. 6 infra.

[4] The policymaking exception does not extend to speech concerning corruption or potential violations of the law. Malone v. Indianapolis Housing Agency, 102 F.Supp.2d 1038, 1043 (S.D. Ind. 2000). Although Vargas-Harrison alluded to "potential conflicts of interest" on the part of those involved in the P-5 decision-making process, it does not appear that she accused anyone of unlawful activity. Defendant's Proposed Findings of Fact ("DPFOF"), pp. 7-8.

[5]Several other circuits regard the question as a matter of law. See, e.g., Gordon v. Rockland County, 110 F.3d 886, 888 (2d Cir.) cert. denied, 522 U.S. 820 (1997).

[6] The defendants argue, and would attempt to prove at trial, that there were other reasons for reassigning (and presumably for terminating) Vargas-Harrison. Defendant's Memorandum in Support of Summary Judgment, p. 15 n. 2.

[7] Quoting the above passage from Warzon, Judge Reynolds suggests that the defendants' policy may not have been "'stated' within the meaning of the policymaking employee exception." Reynolds Op., p. 10. Viewing the record in its entirety, it is clear that the defendants favored a version of the P-5 program that would maximize employment for union members, and that Vargas-Harrison favored a leaner approach that would have cost union jobs. To reach any other conclusion would turn a blind eye to the undisputed facts as well as the political realities of educational policymaking in urban settings today.

[8] Although Judge Reynolds believed that Warzon could be

distinguished on the basis that the policy of the defendants in this case was not sufficiently "stated," the Court does not find this to be the appropriate focus. See n.7 supra. The Seventh Circuit's emphasis, in Warzon, was on the nature of the plaintiff's duties, not whether the policies she opposed were "stated" for purposes of the policymaker exception.

[9] Vargas-Harrison has sued McGoldrick, Pelej and Stephens-Rogers in their official as well as their individual capacities. However, "[a]n official capacity suit is the same as a suit against the entity of which the officer is an agent." DeGenova v. Sheriff of DuPage County, 209 F.3d 973, 974 n. 1 (7th Cir. 2000) (citing McMillian v. Monroe County, 520 U.S. 781, 785 n. 1 (1997)). When faced with actions alleging both municipal and official capacity claims, the latter are properly dismissed as redundant. Smith v. Metropolitan School Dist., 128 F.3d 1014, 1020 n. 3 (7th Cir. 1997), cert. denied, 524 U.S. 951 (1998).

[10] Indeed, as Judge Reynolds noted, most of the cases cited in Vargas-Harrison's brief are inapposite because they address the issue of who is (and is not) a policymaker in a different context (municipal liability under Section 1983). Reynolds Op., p. 9; see also Baxter v. Vigo County School Corp., 26 F.3d 728, 735 (7th Cir. 1994).

Civil Action No. 99-C-0845

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

JUANA VARGAS-HARRISON,
Plaintiff,

v.

RACINE UNIFIED SCHOOL DISTRICT,
DENNIS McGOLDRICK, JOHN PELEJ,
and PATRICIA STEPHENS-ROGERS,
Defendants.

Filed November 11, 1999

DECISION AND ORDER DENYING PLAINTIFF'S
MOTION FOR A PRELIMINARY INJUNCTION

I. OVERVIEW

Plaintiff Juana Vargas-Harrison ("Vargas-Harrison") was principal at the Gilbert Knapp Elementary School for defendant Racine Unified School District ("District"), for the

1998-1999 school year. For the 1999-2000 school year, Vargas-Harrison was reassigned to an assistant principal position at Gilmore Middle School. On July 26, 1999, Vargas-Harrison commenced this action, alleging that she was retaliated against for exercising her First Amendment rights in violation of 42 U.S.C. § 1983. The alleged retaliation is her reassignment at the same pay to the assistant principal position.[1]

Vargas-Harrison has filed a motion for a preliminary injunction, asking the court to order the District to return her to her former position as Gilbert Knapp Elementary School principal. On September 21-24, 1999, the court conducted a hearing on Vargas-Harrison's motion. The court heard testimony from a number of witnesses, received exhibits, and heard the arguments of counsel.[2] There are three important players in the present dispute: Vargas-Harrison, the school administration, and the teacher union, which is not named as a defendant. The parties present conflicting accounts: defendants describe Vargas-Harrison as having her own agenda and failing to collaborate with staff, parents, community members, and the teacher union, while Vargas-Harrison contends that her authority was circumvented by defendants and the teacher union.

Although the court finds that Vargas-Harrison will probably prevail at trial on her claim of retaliation for exercising her First Amendment rights, her request for a preliminary injunction is denied because it would be too disruptive to the operation of her school to return her to the principal position at, this time.

The following background section contains a detailed account of the facts which have led the parties to court. The court must go into much minutiae to fully explain the factual circumstances of this action. However, the dispute basically amounts to the teacher union objecting to Vargas-Harrison's actions (which the court finds that she was entitled to take) to ensure that the teacher union members would be protected.

II. BACKGROUND

A. P-5 Programs

This dispute arose out of the operation of a P-5 program ("P" for preschool through the 5th grade) in Wisconsin. Therefore, it is necessary to outline what P-5 programs are and what a principal's role is with respect to their school's P-5 program.

Section 115.45 of the Wisconsin Statutes ("P-5 Statute") provides that school boards may apply to the Wisconsin Superintendent of Public Instruction for a grant, awarded for a three-year period, for preschool to grade 5 programs. The underlying purpose of the statute is to provide "a unique approach to addressing the educational needs of economically disadvantaged elementary school students." (Ex. 501 at 5.) A program developed pursuant to the P-5 Statute is referred to as a "P-5 program."

The P-5 Statute indicates a focus on low-income students, and provides for programs for four-year-old students, annual testing, a multidisciplinary team approach, class size restricted to twenty-five students, annual written performance evaluations of each staff member, and in-service training. The P-5 Statute also requires that each participating school:

> Establish a council composed of teachers, parents . . . school board members and community leaders to monitor and make recommendations to the school board concerning the school's educational programs.
>
> Develop plans to encourage and increase parental involvement in efforts to improve the quality of education.
> Wis. Stat. § 115.45(4)(g)(1)-(2).

A P-5 program overview from the State Superintendent of

Public Instruction further emphasizes that "[e] ach school is required to establish a local P-5 Advisory Council to promote shared decision-making among teachers, parents, community members and administrators." (Ex. 501 at 5; see also Ex. 501 at 9, 12, and 17.) The court will refer to this council as the On-site Advisory Council."

The P-5 program overview from the State Superintendent of Public Instruction further explains that: "Because site-based management and shared decision-making serve as the foundations for the P-5 Program, it is critical that each school principal play a strong leadership role to involve all members of the school community. They develop innovative approaches to educating disadvantaged children by harnessing the collective intelligence of staff members, parents and others." (Ex. 501 at 11 (emphasis added).) Principals, therefore, are given a unique role[3] and certain responsibilities for developing and facilitating the On-site Advisory Council under the P-5 Statute, independent from their duties for a specific school district.

In the District, the On-site Advisory Council for each participating school must first submit proposals to the District's Curriculum and Instruction Committee ("C&I Committee"), which is made up of three members of the Racine Board of Education. Once the C&I Committee approves a P-5 proposal, the proposal goes to the Board of Education, and then to the State P-5 Committee for ultimate approval. Six schools in the District, including Gilbert Knapp Elementary School, currently have P-5 programs.

In Wisconsin, public education is financed by property taxes (nearly 40 percent), state aid (nearly 60 percent), and federal aid (less than five percent). The state has increased state aid dramatically in the past fifteen years, but to "control costs" (i.e., to prevent property taxes from going up), the state has placed a cap on amounts schools can spend, which amounts can be exceeded only by approval of a local referendum. In addition, the state has appropriated funds for P-5 programs, which funds go directly to school districts. The P-5 program

funds can be used for jobs—which the teacher union wanted—or for other educational functions—which Vargas-Harrison wanted. The fight over jobs (in this case, three) versus educational programs is what gave rise to the dispute between the parties.

In the present case, Vargas-Harrison, believed (and said so) that Gilbert Knapp Elementary School's On-site Advisory Counsel was not established and did not function in accordance with the P-5 Statute and the directives of the State Superintendent of Public Instruction. The court finds that Vargas-Harrison was correct in this belief (although the correctness does not matter for present purposes) and was retaliated against for expressing her views.

B. Individuals Involved

Vargas-Harrison has been employed by the District in various capacities since 1991.[4] Vargas-Harrison was the principal of Caddy Vista Elementary School ("Caddy Vista") for the school years 1995-1998. In 1998, Caddy Vista was closed for budgetary reasons. Vargas-Harrison was then assigned to be the principal of Gilbert Knapp Elementary School ("Knapp") from the fall of 1998, to June 1999. Vargas-Harrison is currently assigned to be assistant principal at Gilmore Middle School ("Gilmore"). Vargas-Harrison has been under the care of a number of doctors since June, for problems she attributes to her reassignment to Gilmore. Vargas-Harrison has not reported to Gilmore for this year, using her accumulated sick days. At the preliminary injunction hearing, Vargas-Harrison impressed the court as being a very dedicated and able principal who saw her duty and did it.

Defendant Dennis McGoldrick ("Superintendent McGoldrick") has been the Superintendent of Schools for the District since 1997, and has been with the District in various capacities for twenty-seven years. Superintendent McGoldrick is responsible for assigning approximately 100 administrators, including principals, to their positions within the District. Superintendent McGoldrick made the decision to

transfer Vargas-Harrison to the assistant principal position at Gilmore. At the preliminary injunction hearing, Superintendent McGoldrick impressed the court as a fine superintendent who certainly did not want any trouble.

Defendant Patricia Stephens-Rogers ("Supervisor Stephens-Rogers") is the Director of School Operations and Staff Development for the District. She has been with the District in various capacities for almost thirty years. Beginning in July 1998, Supervisor Stephens-Rogers began supervising principals. Supervisor Stephens-Rogers was Vargas-Harrison's direct supervisor for the 1998-1999 school year, and did her best to get everyone to agree regarding Knapp's P-5 proposal which, as we shall see, was impossible.

Defendant John Pelej ("Deputy Superintendent Pelej") is the Deputy Superintendent of Schools for the District, and is Supervisor Stephens-Rogers' direct supervisor.

Richard Fornal ("P-5 Director Fornal") is the Supervisor of Curriculum and Instruction for the District, and also the Director of P-5 and Title I Programs.

Lee Wicklund ("Assistant Superintendent Wicklund") was the District's Assistant Superintendent for Instructional Services for the 1998-1999 school year; he currently is the Curriculum Instruction Coordinator. Assistant Superintendent Wicklund is the direct supervisor of P-5 Director Fornal.

James Ennis ("Union Director Ennis") is the executive director of the Racine Education Association ("Union"), which is the teacher union. Union Director Ennis was the dominant person in this matter.

C. Knapp P-5 Program

At the beginning of the 1998-1999 school year, when Vargas-Harrison began as principal at Knapp, the previous school year's On-site Advisory Council, consisting of nine teachers and one parent, was in place. Vargas-Harrison had not

previously worked in a school with a P-5 program.[5] Vargas-Harrison reviewed the existing P-5 program and attended monthly meetings for principals of P-5 schools. P-5 Director Fornal and Sandra Dercole ("Dercole"), the P-5 Education Program Coordinator for the State, were usually at these meetings. At the first P-5 principal meeting, Vargas-Harrison raised concerns that Knapp did not have a P-5 coordinator to assist with implementation of the school's P-5 program, as did four of the other five P-5 schools in the District.[6] Also from the beginning, Vargas-Harrison raised concerns regarding the lack of diversity of Knapp's On-site Advisory Council; the potential conflict of interest of individuals on the On-site Advisory Council who were paid with P-5 funds; and whether teachers serving as members of the On-site Advisory Council should be paid for the time they spent attending the council meetings.

Knapp's old On-site Advisory Council met several times in September 1998, which meetings Vargas-Harrison attended. Shortly thereafter, a dispute arose regarding whether the teacher members of the old On-site Advisory Council would be paid for their work on the council. Vargas-Harrison talked to Supervisor Stephens-Rogers regarding what should be done; Supervisor Stephens-Rogers told Vargas-Harrison to contact Frank Johnson ("Johnson"), the District's Director of Employee Relations. Vargas-Harrison sent Johnson a memorandum inquiring about the teacher pay issue. Johnson responded by memorandum that the teachers would have to volunteer their time spent on the On-site Advisory Council, which turned out to be unacceptable to the Union. Because all members of Knapp's On-site Advisory Council except one were teachers, and the teachers were unwilling to meet if they were not going to be paid, the old On-site Advisory Council ceased to meet as of October 1998.[7]

Vargas-Harrison became concerned with developing the Knapp P-5 proposal for the 1999-2000 school year. She talked to Supervisor Stephens-Rogers about what she needed to do; Supervisor Stephens-Rogers had no advice. At the January 1999 P-5 principal meeting, Vargas-Harrison spoke to Dercole,

the State P-5 Education Program Coordinator, and asked for samples of P-5 proposals which Dercole thought were outstanding. Dercole gave Vargas-Harrison two proposals. (Exs. 48 and 49.) Since the On-site Advisory Council would not meet, Vargas-Harrison undertook on her own to develop Knapp's P-5 proposal for 1999-2000.

On February 5, Vargas-Harrison wrote a four-page memorandum to Assistant Superintendent Wicklund, copying Superintendent McGoldrick, Supervisor Stephens-Rogers, P-5 Director Fornal, the C&I Committee, and Johnson (the District's Director of Employee Relations), about concerns she had, and her proposed recommendations. (Ex. 52.) Assistant Superintendent Wicklund never responded to this memorandum, but apparently passed the memorandum on to P-5 Director Fornal, who replied by memorandum of February 25, stating in part that "we are working to address your concerns. Even though your letter was sent to Dr. Wicklund, I am responsible for the P-5 Program in our District." (Ex. 53.) However, Vargas-Harrison got no direction from P-5 Director Fornal; when she asked P-5 Director Fornal what she should do in light of the fact that there was no On-site Advisory Council functioning at Knapp and the P-5 proposal deadline was approaching, P-5 Director Fornal responded that as principal, she was responsible.[8]

Vargas-Harrison was concerned about getting input from staff members, parents, and community members, and enlisted the assistance of teachers who were willing to volunteer, parents, and community members for creating Knapp's P-5 proposal.[9] Vargas-Harrison met with these individuals to discuss the P-5 proposal, and often followed-up with letters.[10] There were no organized meetings of all interested individuals for purposes of developing Knapp's P-5 proposal.

At a P-5 principal meeting on April 1, P-5 Director Fornal informed the principals that their P-5 proposals had to be submitted by April 16. Vargas-Harrison was in a Catch-22 position, since the Knapp teachers were going on Easter break. Vargas-Harrison started to work consistent with her

proposal outlined in her February 5 memorandum to Assistant Superintendent Wicklund (Ex. 52), i.e., she was consulting staff, parents, and community members to perform the functions of the non-functioning On-site Advisory Council. She spoke to Supervisor Stephens-Rogers about her concerns, as well as to another P-5 principal.

On April 22, the C&I Committee of the Racine Board of Education met to discuss the six P-5 school proposals.[11] The C&I Committee was made up of three members of the school board–the chairman, William Schalk ("Chairman Schalk"), Michael Pitsch, and Stella Young. Prior to the presentations of the individual proposals, Union Director Ennis spoke, discussing concerns with Vargas-Harrison's P-5 proposal, which he thought should be rejected.[12] There were then presentations by the principals of the six schools with P-5 proposals; each presentation was followed by questions from the C&I Committee members. Vargas-Harrison presented Knapp's P-5 proposal (Ex. 36) to the C&I Committee.

Chairman Schalk, in reviewing Knapp's P-5 proposal prior to the meeting, found the proposal lacking in that it did not have the necessary number of supporting signatures of committee members, and did not reflect a teamwork approach; he instructed Vargas-Harrison to get together with the On-site Advisory Council, and come up with a final proposal, including council member signatures, to be presented at the next C&I Committee meeting. Of course this would have been impossible, since, given the Union's instruction to its teacher members that they should not participate without being paid, Knapp's On-Site Advisory Council was not functioning.[13]

Vargas-Harrison advised the C&I Committee that she had talked to parents and staff in developing the proposal. Vargas-Harrison also indicated that she had signatures of approximately thirty individuals (staff, parents, and community members) who supported the P-5 proposal, which she had at the meeting in a folder. (Ex. 51.) Vargas-Harrison had not attached the signatures to the P-5 proposal because she had not seen the signatures on the examples she got from

Dercole prior to having the April 22 proposal bound, and she was also concerned with confidentiality because the proposal recommended the displacement of three staff members, which was objected to by Union Director Ennis. It is unclear how the C&I Committee responded to Vargas-Harrison's indication that she did have supporting signatures of staff, parents, and community members.

Vargas-Harrison's proposal was not voted on;[14] the proposals for the five other schools in the District with P-5 programs were approved. The C&I Committee report states that the C&I Committee "refers the Knapp P-5 proposal back to administration for further work and identification of issues for the new [C&I Committee] members." (Ex.7, ¶ 4(2).)[15]

At a May 4 meeting with Vargas-Harrison, Supervisor Stephens-Rogers, and PTA members,[16] Supervisor Stephens-Rogers indicated that at Knapp's next staff meeting, Vargas-Harrison would introduce the new P-5 coordinator,[17] and representatives for each grade level, to serve on the On-site Advisory Council, would be elected.

During a discussion on May 6 between Vargas-Harrison, Stephens-Rogers, and Union Director Ennis, Union Director Ennis indicated that he would be sending a letter to parents to inform them of an upcoming On-site Advisory Council meeting. Vargas-Harrison said that, as principal, she should and would prepare the letter, but later that same day, a memorandum was sent by Union Director Ennis and Supervisor Stephens-Rogers to Knapp's staff, scheduling a work session for the P-5 proposal for May 11-12 in the Union office. (Ex. 42.) The court will refer to the group which met at the Union office as the "Union On-site Advisory Council." Superintendent McGoldrick, Deputy Superintendent Pelej, Assistant Superintendent Wicklund, and P-5 Director Fornal were copied; Vargas-Harrison was not.

On May 7, without knowing about the foregoing memorandum, Vargas-Harrison sent a letter to Knapp parents

informing them of this same May 11-12 On-site Advisory Council meeting called by Union Director Ennis (Vargas-Harrison, not being informed of the meeting dates and times, got that information from a secretary). (Ex. 27.) Supervisor Stephens-Rogers knew that Vargas-Harrison was going to send this letter.

Also on May 7, Vargas-Harrison sent a memorandum to Supervisor Stephens-Rogers questioning how the On-site Advisory Council was being handled, and asking why Vargas-Harrison, as principal, had not been informed of related activities; Vargas-Harrison asked Supervisor Stephens-Rogers to respond. (Ex. 28.)

On May 10, P-5 Director Fornal responded to Vargas-Harrison's May 7 memorandum:[18]

> As you know, Lee Wicklund, Pat Stephens[-]Rogers, and I have been working as a team to resolve P-5 Program concerns at Knapp Elementary School. It would be inappropriate for me to answer the questions presented in your May 7, 1999 memo due to the fact that Dr. Stephens-Rogers is your immediate supervisor. However, it is my understanding that Dr. Stephens[-]Rogers will be addressing the questions with you in a timely manner.

(Ex. 8.) Superintendent McGoldrick, Assistant Superintendent Wicklund, and Supervisor Stephens-Rogers were copied on P-5 Director Fornal's May 10 memorandum.

On May 10, Union Director Ennis wrote Supervisor Stephens-Rogers about Vargas-Harrison's May 7 letter to Knapp parents regarding the On-site Advisory Council meeting which said:

> 1. We ask that all parents be re-informed by letter that this is a meeting of only the "Representatives" and not a public forum.

> 2. We ask that you insure and communicate to us that this is the last time Dr. [Vargas-]Harrison will interfere with the process.

(Ex. 20.) Supervisor Stephens-Rogers responded to Union Director Ennis, by memorandum dated May 11, that the three of them (Vargas-Harrison, Supervisor Stephens-Rogers, and Union Director Ennis) had decided on May 6 that Vargas-Harrison would send such a letter to parents. (Ex. 38.)

Vargas-Harrison testified that she had a regular staff meeting scheduled for May 11 (which would potentially conflict with the May 11 Union On-site Advisory Council meeting called by Union Director Ennis), and that Supervisor Stephens-Rogers never told her to go to the May 11-12 Union On-site Advisory Council meeting. Supervisor Stephens-Rogers told Vargas-Harrison to cancel the staff meeting, which she did.[19]

On May 11, the Union On-site Advisory Council met at the Union offices (not at Knapp) from 3:30 to approximately 6:00 p.m., and the next day from approximately 8:00 a.m. to 6:00 p.m. The meetings were attended by P-5 Director Fornal (on May 12); Supervisor Stephens-Rogers; Assistant Superintendent Wicklund; Union Director Ennis; teacher representatives from grades K-5; one representative each for exceptional education, specialists, and educational assistants; PTA members; a parent at large; and one community member. Vargas-Harrison went home sick in the afternoon on May 11, and was out sick on May 12 – she therefore did not attend either meeting of the Union On-site Advisory Council held in the Union office.

On May 13, Vargas-Harrison sent a letter to David Hazen, President of the Board of Education, responding to a letter Hazen had received from Deputy Superintendent Pelej. (Ex. 22.) Vargas-Harrison discussed her concerns that the Union On-site Advisory Council "does not reflect the membership diversity that the DPI [Department of Public Instruction]

requests for P-5 committee membership," and potential conflicts of interest for individuals being paid from P-5 funds who are on the On-site Advisory Council. The letter also includes a post script stating that she is enclosing her April 22 P-5 proposal, which she states "was rejected because of strong opposition from the union." Superintendent McGoldrick was copied on the May 13 letter, and he forwarded a copy to Supervisor Stephens-Rogers. (Ex. 22.)

Sometime between April 22 and May 25, Deputy Superintendent Pelej told Supervisor Stephens-Rogers to "get this straightened out" with Vargas-Harrison; he was concerned that the proposal process be completed. Supervisor Stephens-Rogers testified that she told Deputy Superintendent Pelej that she was working with Vargas-Harrison, but did not inform him of any problems or concerns (e.g., she did not tell Deputy Superintendent Pelej that Vargas-Harrison was not at the May 11-12 Union On-site Advisory Council meetings held in the Union office).

On May 18, the Union On-site Advisory Council held another meeting to go over the draft of its proposal (which presumably was developed on May 11-12). Vargas-Harrison did not know about this meeting until late morning on May 18, after she received a message that P-5 Director Fornal had telephoned that morning to let her know about the meeting. By memorandum of that date to P-5 Director Fornal, with a copy to Supervisor Stephens-Rogers, Vargas-Harrison stated:

> Due to scheduling conflicts I am unable to attend the P-5 meeting scheduled for today at 3:00 at the REA [Union] office. As I mentioned to you in a prior memo and conveyed to you on the phone at 12:45, it is very difficult for me to attend any functions when I am not given sufficient lead time to rearrange my schedule.
>
> After I talked to you today, I was told by a staff member that this meeting was already arranged by Mr. Ennis last week, so I am

> perplexed as to why I wasn't notified earlier so I could make arrangements to attend the meeting.
>
> In the future I would be happy to attend these sessions given sufficient notice.

(Exs. 24 and 55.)

Vargas-Harrison did not see the Union On-site Advisory Council's proposal ("Union's P-5 proposal"), to be presented to the C&I Committee, until May 20, when a staff member gave her a copy.

On May 21, Supervisor Stephens-Rogers sent Vargas-Harrison an e-mail notifying Vargas-Harrison that the C&I Committee meeting had been rescheduled to May 25. (Ex. 10.) The e-mail stated in part that "Although you may not agree with the [Union's P-5] proposal, I would strongly suggest you plan to attend, as the Knapp building administrator. It would really be in your best interest from a professional standpoint!" Supervisor Stephens-Rogers knew at this time that Vargas-Harrison had had no involvement with the Union On-site Advisory Council.

In a May 24 letter to Supervisor Stephens-Rogers (received on May 25), Union Director Ennis complained about Vargas-Harrison and demanded action by Supervisor Stephens-Rogers with respect to Vargas-Harrison. (Ex. 12.) Supervisor Stephens-Rogers admitted that Union Director Ennis was putting pressure on her to make sure that Vargas-Harrison followed the Union agenda (unspecified in the testimony) before the C&I Committee.

Supervisor Stephens-Rogers testified that she had a telephone conversation with Vargas-Harrison on May 25, during which Vargas-Harrison first indicated she would not attend the May 25 C&I Committee meeting, but then said she would go but did not want parent and teacher representatives

to participate in the presentation. Contrarily, Vargas-Harrison testified that during the telephone conversation with Supervisor Stephens-Rogers, Vargas-Harrison never said she would not attend the C&I Committee meeting, and said that she would do whatever Supervisor Stephens-Rogers said, but that as principal, she wanted to attend. Supervisor Stephens-Rogers testified that she did not originally plan to put her thoughts in writing, but Vargas-Harrison asked if Supervisor Stephens-Rogers would be putting her instructions in writing; Supervisor Stephens-Rogers said she would if she had time, which she did later that day. Because Supervisor Stephens-Rogers felt the memorandum she prepared could be considered a letter of reprimand, she put it in Vargas-Harrison's personnel file, and copied Superintendent McGoldrick, Chairman Schalk, Assistant Superintendent Wicklund, and P-5 Director Fornal, per District policy regarding letters of reprimand.[20] The memorandum states in part that

> You are hereby, directed to be in attendance at the Board's [C&I] Committee meeting today, Tuesday, May 25, 1999 . . .
>
> * * *
>
> I am well aware that you are not in full agreement with the contents of the [Union's P-5 Proposal], however, your lack of involvement in the planning and development of the [Union's P-5 Proposal] was a conscious decision you made.
>
> * * *
>
> In conclusion, I am deeply disappointed by your inflexible attitude, and with your disregard for the many recommendations I have shared with you.

> Your full cooperation in this matter is anticipated, and will not be debated any further.

(Ex. 13.)

Supervisor Stephens-Rogers knew Vargas-Harrison did not agree with the contents of the Union's P-5 Proposal, but she felt strongly that Vargas Harrison, as the Knapp principal, should be present at the May 25 C&I Committee meeting. Supervisor Stephens-Rogers testified that she encouraged Vargas-Harrison to express to the C&I Committee her disagreement with the Union's P-5 Proposal.

The C&I Committee met on May 25.[21] P-5 Director Fornal presented the Union's P-5 Proposal. (Ex. 54.) Vargas-Harrison spoke out regarding her April 22 proposal.[22] The C&I Committee approved the Union's P-5 Proposal.

The following are the major differences between Vargas-Harrison's April 22 proposal, and the Union's P-5 Proposal which was ultimately approved by the C&I Committee on May 25:

(1) Vargas-Harrison's proposal would have a full-time P-5 coordinator, while the Union's P-5 Proposal would have a half-time P-5 coordinator;

(2) Vargas-Harrison's proposal would have eliminated a computer assistant position (other schools used the P-5 coordinator to perform the computer assistant's duties, and elimination of the position would have saved approximately $12,000);

(3) Vargas-Harrison's proposal would have eliminated a home school worker position (the position supplied duplicative services with Knapp's social worker/counselor); and

(4) Vargas-Harrison's proposal would have eliminated the

Reading Recovery program[23] and utilized other reading programs,[24] thereby eliminating two staff members who occupied positions which equaled one full-time position.

The general thrust of Vargas-Harrison's proposal was that money saved by its recommendations would be directed to students and materials. The budgets of both proposals totaled the same amount (nearly $170,000).

On May 28, Supervisor Stephens-Rogers, at Deputy Superintendent Pelej's direction, sent an e-mail to Vargas-Harrison (with a copy to Superintendent McGoldrick), informing her of a June 1 meeting with Supervisor Stephens-Rogers and Deputy Superintendent Pelej "to discuss concerns we have regarding the recent Knapp P-5 proposal presentation at the Board's [C&I] Committee meeting on Tue[s]day, May 25, 1999." (Ex. 15.) Supervisor Stephens-Rogers testified that Deputy Superintendent Pelej was concerned that Vargas-Harrison had reintroduced her original proposal of April 22. Deputy Superintendent Pelej testified that he called the June 1 meeting to find out why there was not a collaborative effort with developing Knapp's P-5 proposal, since there would be a continuing need to meet the P-5 guidelines in future years.

Supervisor Stephens-Rogers testified that she felt that Vargas-Harrison's reintroduction of the April 22 proposal at the May 25 C&I meeting was inappropriate (no further elaboration was testified to), and that in the June 1 meeting, Deputy Superintendent Pelej indicated that Vargas-Harrison should not have mentioned the April 22 proposal. Vargas-Harrison testified that Deputy Superintendent Pelej said that she had no right to talk to the C&I Committee about the April 22 proposal, and told Supervisor Stephens-Rogers that she should reprimand Vargas-Harrison. In contrast to Supervisor Stephens-Rogers and Vargas-Harrison's testimony, Deputy Superintendent Pelej testified that he did not tell Vargas-Harrison that she should not have brought up the April 22 proposal.

Within a few days of the June 1 meeting, Deputy Superintendent Pelej briefed Superintendent McGoldrick on the meeting. He did not go into detail regarding the content, but told Superintendent McGoldrick that the meeting was unsuccessful because he did not have a clear understanding of what had happened. Deputy Superintendent Pelej testified that in the first two or three weeks of June, Superintendent McGoldrick told him he was concerned about Vargas-Harrison remaining at Knapp.

The District's Assistant Superintendent of Human Resources advised Vargas-Harrison to discuss the June 1 meeting with Superintendent McGoldrick, because Vargas-Harrison was very upset about it. Vargas-Harrison and Superintendent McGoldrick met on June 4. Vargas-Harrison did the majority of the talking, explaining her side of what had happened with respect to the entire P-5 process. Superintendent McGoldrick testified that he told Vargas-Harrison that everyone at the May 25 C&I Committee meeting was very uncomfortable with her presentation, and that he had concerns that there had been two, and not one, proposals from Knapp: He told Vargas-Harrison that after four years of observing her as a principal, he had concerns regarding her ability to collaborate with parents and staff. Vargas-Harrison also said she had heard a rumor that she was going to be reassigned; Superintendent McGoldrick responded that the decision had not yet been made, but that her reassignment was a possibility.

Superintendent McGoldrick testified that he finalized his decision to reassign Vargas-Harrison between June 1 and July 1. Pursuant to contract, Superintendent McGoldrick had to inform all administrators, including principals, of their assignments by July 1.

In mid-June, Superintendent McGoldrick told the Assistant Superintendent of Human Resources to inform Daniel Thielen, another administrator employed by the District, that he would be assigned to the principal position at Knapp. On June 18, Superintendent McGoldrick informed Vargas-

Harrison that she would be assigned to Gilmore as assistant principal.

III. DISCUSSION

Neither party explicitly acknowledges the underlying forces behind the present dispute. The court finds that Vargas-Harrison, a dedicated and hard-working principal who had no functioning On-site Advisory Council during the time frame for development of Knapp's P-5 proposal, was opposed by the Union for a number of reasons, including her opposition to teacher payment for On-site Advisory Council work, and her proposal to eliminate teacher positions. While defendants stress the importance of collaboration between the principal, staff, parents, and community members in developing a P-5 proposal, Vargas-Harrison was effectively shut out of the P-5 process. However, the ultimate issue is whether Vargas-Harrison's advocacy of the April 22 proposal, and her opposition to the P-5 proposal which was ultimately adopted, supports an actionable First Amendment claim. The court finds that it does, and that Vargas-Harrison was retaliated against because of her speech concerning Knapp's P-5 proposal.

A. Preliminary Injunction Standard

In deciding whether to grant a motion for a preliminary injunction, the court first determines:

(1) whether plaintiff has demonstrated some likelihood of succeeding on the merits; and

(2) whether plaintiff has demonstrated an inadequate remedy at law if preliminary relief is not granted.

If plaintiff has demonstrated both of these factors, the court must then:

(3) consider the irreparable harm that defendants will suffer if the preliminary relief is granted, balanced against the

harm to plaintiff; and

(4) weigh the public interest by considering the effect of granting or denying relief on nonparties

See Washington v. Indiana High Sch. Athletic Ass'n, 181 F.3d 840, 845 (7th Cir. 1999).

1. Likelihood of Succeeding on First Amendment Claim

In determining- whether Vargas-Harrison prevails on her First Amendment claim, the court:

(1) considers whether Vargas-Harrison's statements were on a matter of public concern;
(2) considers whether Vargas-Harrison's statements played a substantial role in the decision to transfer her; and

(3) performs the balancing test established by Pickering v. Board of Ed., 391

U.S. 563, 568 (1968), i.e., weighs Vargas-Harrison's First Amendment interest again defendants' interest in efficiently providing services.[25]

Defendants may defeat Vargas-Harrison's First Amendment claim by showing that they would have transferred Vargas-Harrison even if she had not made the statements. Klunk v. County of St. Joseph, 170 F.3d 772, 775-76 (7th Cir. 1999).

There is no real dispute that Vargas-Harrison's statements to the C&I Committee about her April 22 P-5 proposal involved a matter of public concern.[26]

With respect to the causal element of her First Amendment claim (i.e., whether her statements played a substantial role in Superintendent McGoldrick's decision to reassign Vargas-Harrison, and whether 'the District can show that Vargas-Harrison would have been reassigned regardless of her statements), Vargas-Harrison comes out ahead.

Superintendent McGoldrick testified that he felt Vargas-Harrison had not displayed the skills necessary to be a successful principal, thought there was an unhealthy climate at Knapp, and wanted to get Vargas-Harrison in a position where she could succeed. Union Director Ennis testified that he knew Vargas-Harrison would not be the Knapp's principal for the 1999-2000 school year. When asked how he knew this, Union Director Ennis stated something to the effect that "you can't be around for thirty years without knowing this." The court believes and finds that Vargas-Harrison was transferred because of her conflict with Union Director Ennis and that his letter of May 10, in which he states that "[w]e ask that you [Supervisor Stephens-Rogers] insure and communicate to us that this is the last time Dr. [Vargas-]Harrison will interfere with the process" (Ex. 20), was a factor in the decision to transfer Vargas-Harrison.

Superintendent McGoldrick was aware of the underlying controversies surrounding Vargas-Harrison's involvement in the P-5 process. While Superintendent McGoldrick testified that he had been considering reassigning Vargas-Harrison for four years, several facts suggest otherwise.

1. When Caddy Vista (where Vargas-Harrison was principal from 1995-1998) closed in 1998, Superintendent McGoldrick assigned Vargas-Harrison to another principal position at Knapp; Superintendent McGoldrick has no notes or documents regarding Vargas-Harrison's alleged deficiencies at Caddy Vista. Vargas-Harrison's immediate supervisor at Caddy Vista was Ann Laing ("Laing"). During Vargas-Harrison's principalship at Caddy Vista during 1995-1998, Laing told Superintendent McGoldrick that Laing was spending almost as much time on intervention at Caddy Vista as all other schools combined. However, with respect to the 1996-1997 school year, Laing gave Vargas-Harrison a weighted score of 3.70 on her yearly evaluation, putting Vargas-Harrison in the highest performance level. (Ex. 4.)

2. On February 1, 1999, Superintendent McGoldrick signed

Vargas-Harrison's Individual Administrator's contract for the period July 1, 1999, to June 30, 2001. (Ex. 5.)

3. Superintendent McGoldrick has no documents to support his contention that he had been considering removing Vargas-Harrison from a principal position for several years, and he did not speak to anyone of the possibility until June 1999.

4. Superintendent McGoldrick did not review Vargas-Harrison's personnel file, did not go to Supervisor Stephens-Rogers to see if Vargas-Harrison's 1998-1999 evaluation had been done; or otherwise discuss Supervisor Stephens-Rogers' recommendations, before he "finalized" his decision in June 1999.

The balancing of interests weighs in favor of Vargas-Harrison. Vargas-Harrison, as principal, was given the responsibility to spearhead the P-5 proposal process under the P-5 Statute, and she had inside information on the needs of her school. Of course, the District was concerned that given Vargas-Harrison's opposition to the Union's P-5 proposal, and her alienation of the Union, she would not be able to effectively perform her duties at Knapp. But the District knew of Vargas-Harrison's efforts, and encouraged them, but did not stand behind Vargas-Harrison when she was opposed by Union Director Ennis.

In considering all the elements of a First Amendment claim, the court concludes that Vargas-Harrison has established that she has a likelihood of success on the merits.

2. Inadequate Remedy at Law

Vargas-Harrison claims to have suffered irreparable harm in the form of a "reputational stigma" and a loss of her First Amendment rights.[27] There was no testimony given regarding the reputational damages suffered by Vargas-Harrison, although Superintendent McGoldrick did testify that an assistant principal position was a "lesser" position than a principal position, in the sense that assistant principals report

to principals.

The Seventh Circuit has recognized that loss of a particular job does not constitute irreparable harm for preliminary injunction purposes in the First Amendment context, and that harm which is not easily quantified does not necessarily justify a preliminary injunction. Webb v. Board of Trustees of Ball State Univ., 167 F.3d 1146 (7th Cir. 1999) (university professor objects to class assignments). Given the state of the record, the court concludes that monetary compensation will be sufficient for any damages Vargas-Harrison may prove at trial.

3. Balancing of Harms

While Vargas-Harrison testified that she felt able to go back to either the principal position at Knapp or the assistant principal position at Gilmore, she also testified that she would not go back to work until her doctors release her. To date, Vargas-Harrison's doctors have not indicated when she can go back to work. In addition, Vargas-Harrison also testified that these events have affected her ability to be an effective principal. Under these circumstances, it would be unjustifiable and disruptive to force the District to remove the current principal from Knapp, and to reassign Vargas-Harrison as Knapp's principal.

4. Public Interest

The public interest lies on both sides of this dispute. Encouraging debate on important issues of school programming and funding, as well as not changing principals now and disrupting school administration, are important to the public at large.

III. CONCLUSION

While Vargas-Harrison may well succeed at trial, the court

will not grant her request for a preliminary injunction in the middle of the school year. The record indicates that Vargas-Harrison is not physically and/or mentally capable of returning to the principal position at Knapp, and the removal of Knapp's current principal would be disruptive to the entire school community.

Plaintiff Juana Vargas-Harrison's motion for a preliminary injunction is

DENIED.

The courtroom deputy clerk will notice a telephonic scheduling conference.

SO ORDERED this 11th day of November, 1999.

John W. Reynolds
United States District Judge

Footnotes

[1] In Vargas-Harrison's initial brief in support of her motion for a preliminary injunction (filed on July 26, 1999), as well as in her supplemental brief of September 21, 1999, and the discussion section of her September 28, 1999 supplemental brief, Vargas-Harrison only discusses retaliation in the form of her reassignment to the assistant principal position. However, in the conclusion section of her September 28, 1999 supplemental brief, Vargas-Harrison summarily states that she has suffered four instances of retaliation: (1) the placement of a May 25, 1999 reprimand in her personnel file; (2) the receipt of a June 1, 1999 e-mail directing her to attend a meeting with her supervisor and the Deputy Superintendent of Schools; (3) unspecified treatment in a June 4, 1999 meeting with the Superintendent of Schools; and (4) her reassignment to the assistant principal position. The claim of retaliation with respect to the additional three instances of alleged retaliation, listed in (1)-(3) above, is undeveloped, but will be considered generally within the same scope of

retaliation as Vargas-Harrison's reassignment for purposes of deciding the present motion.

[2] All exhibits cited in this decision are those numbered and received at the hearing.

[3] For example, the P-5 Statute provides in part that "the school board . . . upon receipt of an application from the principal of an elementary school . . . may apply . . . for a grant under this section." Wis. Stat. § 115.45(2)(a) (emphasis added).

[4] Vargas-Harrison was initially hired as a high school Spanish teacher. For the 1994-1995 school year, Vargas-Harrison left the District for a principal position in Waukegan, Illinois. She was then offered, and she accepted, a principal position at Caddy Vista Elementary School.

[5] Before the 1998-1999 school year, Supervisor Stephens-Rogers had not had any oversight responsibility for P-5 program implementation, and Deputy Superintendent Pelej had not had involvement with the development and implementation of a P-5 program.

[6] In a November 27, 1998 letter to P-5 Director Fornal, Dercole states that a P-5 coordinator is required for schools with principals new to P-5 programs (such as Vargas-Harrison). (Exs. 18 and 46.)

[7] After negotiations between the District and the Union, the teachers were eventually paid in June 1999.

[8] On March 11, P-5 Director Fornal sent a memorandum to Assistant Superintendent Wicklund, Supervisor Stephens-Rogers, and Union Director Ennis, regarding P-5 issues; for some unknown reason, he did not share the memorandum with Vargas-Harrison. (Ex. 40.) The memorandum states in part that "it is critical that each school principal play a strong leadership role to involve all members of the school community. The principal must develop innovative

approaches to educating disadvantaged students by harnessing the collective intelligence of staff members, parents, and others." This language directly tracks language found in the State Superintendent's P-5 program overview, quoted above. (Ex. 501 at 11.)

[9] Vargas-Harrison circulated a committee sign-up to staff (Ex. 50), requesting that all staff serve, without pay (which did not set well with the Union), in an extra-curricular activity. The sign-up included a committee Vargas-Harrison relied on with respect to the P-5 proposal.

[10] None of these letters were offered into evidence.

[11] The committee report for the April 22 meeting is found at Exhibit 7.

[12] No detail of Union Director Ennis's comments was given in the hearing testimony. Handwritten notes of the meeting state that Union Director Ennis "[a]sks to reject the [Knapp] P-5 proposal and instruct person in charge to re-meet w/the union & determine what's going to happen w/this program." (Ex. 7, handwritten notes at 1.)

[13] It is unclear as to what Chairman Schalk's understanding was of the status of Knapp's On-site Advisory Council.

[14] C&I Committee member Stella Young thought all six proposals, including the Knapp P-5 proposal, should be approved.

[15] Sometime after April 22, there was a meeting between Deputy Superintendent Pelej, Supervisor Stephens-Rogers, and P-5 Director Fornal. Deputy Superintendent Pelej requested that P-5 Director Fornal participate and facilitate meetings to help develop a P-5 proposal for Knapp that followed state guidelines, and that he assist Vargas-Harrison in developing Knapp's P-5 proposal. Deputy Superintendent Pelej told Supervisor Stephens-Rogers to explain to Vargas-Harrison the process and the intent that there be

collaboration between Vargas-Harrison, staff, parents, and community members, and asked that Supervisor Stephens-Rogers coordinate the process. Deputy Superintendent Pelej never convened a meeting with Vargas-Harrison, Supervisor Stephens-Rogers, and P-5 Director Fornal after April 22.

After the Pelej/Stephens-Rogers/Fornal meeting, P-5 Director Fornal did not telephone Vargas-Harrison to attempt to coordinate activities for development of Knapp's P-5 proposal, nor did he meet with Vargas-Harrison. When asked whether Assistant Superintendent Wicklund did anything to integrate Vargas-Harrison into the P-5 planning process, Supervisor Stephens-Rogers testified that a number of (unspecified) things were occurring during that time frame (after April 22). Supervisor Stephens-Rogers testified that she told Vargas-Harrison that the process needed to be moved forward and that she was willing to assist Vargas-Harrison in bringing closure to the P-5 proposal. Supervisor Stephens-Rogers also testified that she shared some (unspecified) recommendations with Vargas-Harrison regarding how to proceed.

[16] Notes of the meeting, taken by Vargas-Harrison's secretary, are found at Exhibit 34.

[17] The Knapp P-5 coordinator was chosen in March 1999.

[18] Supervisor Stephens-Rogers testified that she did have conversations with Vargas-Harrison about the memorandum, and that Supervisor Stephens-Rogers explained that Vargas-Harrison's concerns were "beyond her scope." A handwritten note reflects an instruction by Supervisor Stephens-Rogers to her secretary, that Vargas-Harrison's May 7 memorandum should be directed to P-5 Director Fornal because Supervisor Stephens-Rogers "does not handle P-5." (Ex. 28.)

[19] Supervisor Stephens-Rogers did not testify that she asked Vargas-Harrison to cancel the staff meeting; rather, she testified that her understanding was that the staff meeting was to have a single item agenda, the election of staff

representatives for the On-site Advisory Council, and was to be held at 2:45 to 2:50, with the On-site Advisory Council to meet at 3:30.

[20] Supervisor Stephens-Rogers testified that she has only put one other document into a personnel file — in the 1980s, when she was a principal, she put an unspecified document into a teacher's personnel file.

[21] The committee report for the May 25 meeting is found at Exhibit 16.

[22] A partial transcript of a tape recording of the May 25 meeting is found at Exhibit 35E.

[23] The Reading Recovery program targets eleven of one hundred first grade students at Knapp, working with those eleven students on a one-on-one basis, for a cost exceeding $46,000.

[24] Knapp had the second lowest reading scores in the District. Vargas-Harrison had sought the input of teachers with respect to reading programs; three of four first grade teachers did not support the Reading Recovery program, and three of four second grade teachers were not impressed with the program's results. Vargas-Harrison's proposal recommended adoption of several reading programs, with the primary emphasis on the Success-for-All program, which would be used for all students. (The Success-for-All program was recommended by Assistant Superintendent Wicklund, and endorsed by Superintendent McGoldrick in his testimony.)

[25] Factors to consider in performing the balancing test include:

(1) whether the statements would create problems in maintaining discipline by immediate supervisors or harmony among co-workers;

(2) whether the employment relationship is one in which personal loyalty and confidence are necessary;

(3) whether the statements impeded plaintiff's ability to

perform her daily responsibilities;
(4) the time, place, and manner of the statements;
(5) the context in which the underlying dispute arose;
(6) whether the matter was one on which debate was vital to informed decision-making;
and
(7) whether plaintiff should be regarded as a member of the general public.

[26] In their brief in opposition to the motion for a preliminary injunction, defendants assert that Vargas-Harrison's inflexible support of her April 22 proposal, and her opposition to the Union's P-5 proposal, was for personal, rather than professional, reasons. (Aug. 2, 1999 Br. at 3, 9.) In support of this assertion, defendants cite to a May 24 letter from Union Director Ennis to Supervisor Stephens-Rogers, in which Union Director Ennis complains about Vargas-Harrison. (Ex. 12.) No suggestion of this theory was made at the preliminary injunction hearing, and Exhibit 52 is not sufficient to establish defendants' assertion.

[27] Vargas-Harrison receives the same salary in the assistant principal position as when she was principal at Knapp.

Civil Action No. 99-C-0845

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

JUANA VARGAS-HARRISON,
Plaintiff,

v.

RACINE UNIFIED SCHOOL DISTRICT,
DENNIS McGOLDRICK, JOHN PELEJ,
and PARTICIA STEPHENS-ROGERS,
Defendants.

Filed May 22, 2000

DECISION AND ORDER DATED May 22, 2000 GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff Juana Vargas-Harrison ("Vargas-Harrison") was principal at the Gilbert Knapp Elementary School ("Knapp")

for defendant Racine Unified School District ("District") for the 1998-1999 school year. For the 1999-2000 school year, Vargas-Harrison was reassigned to an assistant principal position at Gilmore Middle School. On July 26, 1999, Vargas-Harrison commenced this action, alleging that she was retaliated against for exercising her First Amendment rights in violation of 42 U.S.C. 1983. The alleged retaliation is her reassignment at the same pay to the assistant principal position. On the same date, Vargas-Harrison filed a motion for a preliminary injunction, asking the court to order the District to return her to her former position as Knapp principal.

On September 21-24, 1999, the court conducted a hearing on Vargas-Harrison's motion. On November 11, 1999, the court entered a decision which denied the motion for a preliminary injunction, finding that it would be too disruptive to the operation of her school to return Vargas-Harrison to the principal position at that time.

Before the court is defendants' motion for summary judgment. The court grants the motion with respect to the individual capacity claims on qualified immunity grounds, and otherwise denies the motion.

The court assumes familiarity with the facts contained in the November 11, 1999 decision. The following background facts are taken from the defendants' February 23, 2000 proposed findings of fact, which were submitted to the court for purposes of deciding the summary judgment motion, and to which Vargas-Harrison has no objection. Local Rule 6.05 (E.D. Wis.); Pl.'s Mar. 29, 2000 Br. at 1. The court will refer to defendant's proposed findings of fact as "DFOF."

II. BACKGROUND

Wisconsin has a grant program whereby a school board, on its own initiative or upon application by a principal, may apply to the State Superintendent for the Department of Public Instruction for a P-5 grant. (DFOF ¶ B. 1.) The purpose of the P-5 grant is to aid individual elementary schools in

developing innovative and successful supplementary educational services for responding to the needs of economically disadvantaged students. (DFOF ¶ B.2.) The P-5 legislation allows individual schools considerable autonomy in proposing projects to improve student academic performance. (DFOF ¶ B.3.) The District participates in the P-5 program, and Knapp began receiving P-5 funds in 1990. (DFOF ¶¶ B.4. and B.5.)

Vargas-Harrison understood that she was responsible for developing and implementing a P-5 program at Knapp. (DFOF ¶ B.6.) The role of the school principal is critical to the P-5 program. Each school principal must play a strong leadership role to involve all members of the school community, and to develop innovative approaches to educating disadvantaged students. (DFOF ¶ B.7.)

The District's Curriculum and Instruction Committee ("C&I Committee") is made up of three school board members, who are elected to the school board. (DFOF ¶ C.1.) Meetings of the C&I Committee are open to the public. (DFOF ¶ Co2.) On April 22, 1999, the C&I Committee met to review the P-5 proposals submitted by Vargas-Harrison and five other elementary school principals within the District. (DFOF ¶ C.3.) At that meeting, Vargas-Harrison presented a proposal which advocated significant changes from the proposals in prior years. (DPOF ¶ C.4.) One of the most significant changes in Vargas-Harrison's P-5 proposal was the recommendation that P-5 dollars be moved from teacher salaries to alternative specialized reading programs, which would result in the elimination of a Home/School Worker, Computer Lab Assistant, and two Reading Recovery staff positions. (DFOF ¶ C.5.)

Vargas-Harrison's P-5 proposal was seriously objectionable to the teachers' union, the Racine Education Association ("REA"), because it would result in the loss of jobs. (DFOF ¶ C.6.) At the April 22 meeting, James Ennis ("Union Director Ennis"), the Executive Director of the REA, stated that he did not support Vargas-Harrison's P-5 proposal. (DFOF ¶ C.7.)

Union Director Ennis requested that Vargas-Harrison's P-5 proposal be rejected until after the "appropriate individuals" could meet with the REA to discuss Union Director Ennis's concerns regarding P-5 administration and coordination, bargaining, site-based management, and staff support of the proposal. (DFOF ¶ C.8.)

At the April 22 meeting, the C&I Committee approved the P-5 proposals presented by the five other elementary schools, but did not approve Vargas-Harrison's P-5 proposal for Knapp. (DFOF ¶ C.9.) The C&I Committee directed that Vargas-Harrison's P-5 proposal be sent back to administration for further work and identification of issues that needed to be addressed. (DFOF ¶ C. 10.) Vargas-Harrison believed her P-5 proposal was rejected because there was strong opposition to it by the REA. (DFOF ¶C.11.)

After her P-5 proposal was rejected, Vargas-Harrison told her immediate supervisor, defendant Patricia Stephens-Rogers ("Supervisor Stephens-Rogers"), the Director of School Operations and Staff Development for the District, that she was upset with Union Director Ennis and the REA, and that she did not want to be a part of the P-5 planning process. (DFOF ¶ D.1.) Supervisor Stephens-Rogers responded by telling Vargas-Harrison that the District had been trying to foster and promote collaboration with the REA with respect to individual school issues. Supervisor Stephens-Rogers told Vargas-Harrison that the District wanted to work together with the REA to resolve the P-5 issues at Knapp. (DFOF ¶ D.2.)

On May 11 and 12, 1999, the P-5 advisory council met at the REA offices to discuss and revise Knapp's P-5 proposal. Vargas-Harrison was invited to these meetings but allegedly went home sick on the afternoon of May 11 and stayed out on May 12, and therefore did not attend the meetings. (DFOF ¶ D.3.) Also on May 11, 1999, Vargas-Harrison sent a letter to the President of the school board. In that letter, Vargas-Harrison argued that the P-5 funds were presently not being put to the best use. She argued that certain individuals

participating in developing the P-5 proposal at Knapp should not be allowed to participate because of potential conflicts of interest. She also enclosed a copy of her original P-5 proposal that she had submitted on April 22, 1999, and that had been rejected by the C&I Committee. (DFOF ¶ D.4.)

The C&I Committee was scheduled to meet again on May 25, 1999, to hear the presentation for the revised P-5 proposal for Knapp. (DFOF ¶ D.5.) On that day, prior to the meeting, Supervisor Stephens-Rogers sent Vargas-Harrison a written memorandum which stated:

> You are hereby, directed to be in attendance at the Board's [C&I] Committee meeting today, Tuesday, May 25, 1999 .
>
> You will be joined in this presentation by teacher, Judy Sommer and parent, Christine Anderson, representatives of the P-5 Advisory Council Planning Committee.[1] Rick Fornal [the Supervisor of Curriculum and Instruction for the District, and also the Director of P-5 and Title I Programs] will be in attendance to provide technical assistance during the presentation where needed.
>
> I am well aware that you are not in full agreement with the contents of the [revised P-5 Proposal], however, your lack of involvement in the planning and development of the [revised P-5 Proposal] was a conscious decision you made.
>
> To now, deny the participation of teachers and parent representatives who expended time and effort in the preparation of this proposal would be untenable!

* * *

A joint presentation of the Knapp P-5 proposal will further demonstrate the involvement by parents and staff as per the committee's directives given to you at their meeting on April 22,1999.

In conclusion, I am deeply disappointed by your inflexible attitude, and with your disregard for the many recommendations I have shared with you.

Your full cooperation in this matter is anticipated, and will not be debated any further.

* * *

(DFOF ¶ D.10.)

Vargas-Harrison attended the May 25, 1999 C&I Committee. (DFOF ¶ E. 1.) At the meeting, Vargas-Harrison stated that she had been directed to be at the meeting by her immediate supervisor, that she had no input regarding the revised P-5 proposal, and that she would be willing to answer questions from the Committee regarding Vargas-Harrison's initial P-5 proposal. (DFOF ¶ E.2.) The revised P-5 proposal was then presented by Rick Fornal, Supervisor of Curriculum and Instruction for the District and Director of P-5 and Title I Programs, several teachers, and a parent. (DFOF ¶ 3.)

After the revised P-5 proposal was presented, Vargas-Harrison asked to speak. (DFOF ¶ 4.) After asking to speak, Vargas-Harrison spoke out against the revised P-5 proposal and refused to support it. She stated that she did not participate in development of the revised P-5 proposal and she had been directed by her supervisor to be present and

support the revised P-5 proposal. Vargas-Harrison handed out copies of her original P-5 proposal, which had already been rejected. Vargas-Harrison argued that her original P-5 proposal had the support of some community members, staff members, and parents. Vargas-Harrison stated that the revised P-5 proposal did not address the needs of Knapp. Vargas-Harrison argued that her original proposal better met the needs of Knapp, and that it was "time to let the principal do the job and stop the union running the school.'" (DFOF ¶ E.5.)

On June 18, 1999, defendant Dennis McGoldrick, the Superintendent of Schools for the District, informed Vargas-Harrison that she would be assigned to Gilmore the following year as assistant principal.

III. DISCUSSION

A. First Amendment Claim

In determining whether Vargas-Harrison prevails on her First Amendment claim, the court initially considers (1) whether Vargas-Harrison's statements were constitutionally protected, i.e., were on a matter of public concern, and (2) whether Vargas-Harrison's statements were a substantial or motivating factor in the decision to reassign her. Thomsen v. Romeis, 198 F.3d 1022, 1027 (7th Cir. 2000).

Defendants argue that they cannot be held liable under the First Amendment in light of the policymaking employee exception, i.e., since Vargas-Harrison was reassigned to the assistant principal position because she advocated a position in conflict with her superiors' policy, and she was in a "policymaking" position, defendants are entitled to summary judgment. Defendants principally rely on Warzon v. Drew, 60 F.3d 1234 (7th Cir. 1995) ("Warzon").

1. Is Vargas-Harrison a Policymaker?

Whether Vargas-Harrison is a "policymaker" is a factual question. Warzon, 60 F.3d at 1239; see also Nekolny v.

Painter, 653 F.2d 1164, 1169 (7th Cir. 1981). To determine if an employee is a "policymaker," the court looks to whether "'the position held by the individual authorizes, either directly or indirectly, meaningful input into government decisionmaking on issues where there is room for principled disagreement on goals of their implementation.'" Warzon, 60 F.3d at 1239 (quoting Nekolny, 653 F.2d at 1170).

Defendants argue that Vargas-Harrison is a "policymaker" in the same sense as that term is used in Warzon because (1) she was the highest ranking administrator at Knapp; (2) she oversaw Knapp's entire school operations; (3) part of her job was to improve academic achievement, challenge students, and give students the best education possible; (4) she was responsible for developing and implementing Knapp's P-5 program; and (5) she had an essential problem-solving role.

In her summary judgment response brief, Vargas-Harrison fails to discuss "policymaker" in the relevant context.

What makes this case unique, and distinct from Seventh Circuit precedent, is that both the P-5 statute and the P-5 program overview from the State Superintendent of Public Instruction require school principals to play a strong leadership role in the P-5 process. Viewing the facts in Vargas-Harrison's favor, Vargas-Harrison was simply doing her duty when she advocated her P-5 proposal, and she was retaliated against for expressing her views. To conclude that Vargas-Harrison is a "policymaker" is not as clear-cut as defendants would have it.

2. Was Vargas-Harrison's Speech in Conflict with Defendants' Stated Policy?

In Warzon, the Seventh Circuit held that if plaintiff "was a confidential or policymaking employee, her superiors could, consistent with the First Amendment, fire her for advocating positions in conflict with their stated policies." 60 F.3d at 1239. In that case, plaintiff ("Warzon") was the appointed controller for the Milwaukee County Department of

Administration. Warzon became intimately involved in proposing revisions to an existing government-provided medical care plan, which revisions were ultimately not supported by the Milwaukee County Board of Supervisors and the Milwaukee County Executive, among others. Warzon continued to criticize the medical care plan, which controversy reached the papers.

Here, neither party definitively explains what defendants' "policy" was, and whether such a policy was "stated" within the meaning of the policymaking employee exception. For example, the revised P-5 proposal was not presented to the C&I Committee, or publicly endorsed, by defendants. The court cannot conclude that defendants are entitled to judgment as a matter of law, based on the policymaking employee exception, with respect to Vargas-Harrison's First Amendment claim.

B. Qualified Immunity

The individual defendants, who are Vargas-Harrison's superiors, argue that they are entitled to qualified immunity, i.e., that they are protected from liability for civil damages because they did not violate clearly established constitutional rights. Harlow v. Fitzgerald, 457 U.S. 800 (1982). Vargas-Harrison has the burden of demonstrating that the applicable constitutional standards were clearly established at the time she was reassigned to the assistant principal position. Gregorich v. Lund, 54 F.3d 410, 413 (7th Cir. 1995). In the First Amendment context, "the facts of the existing caselaw must closely correspond to the contested action before the defendant official is subject to liability." at 415 (citations and quotations omitted). Vargas-Harrison does not cite to closely analogous caselaw, and therefore does not meet her burden. Accordingly, the court concludes that the individual defendants are entitled to qualified immunity.

IV. CONCLUSION

Defendants Racine Unified School District, Dennis

McGoldrick, John Pelej, and Patricia Stephens-Rogers' motion for summary judgment is GRANTED IN PART AND DENTED IN PART. The motion for summary judgment is GRANTED as to qualified immunity, and all claims against defendants Dennis McGoldrick, John Pelej, and Patricia Stephens-Rogers in their individual capacities are DISMISSED. The motion for summary judgment is DENIED in all other respects.

SO ORDERED this 22 day of May, 2000.

John W. Reynolds
United States District Judge

Footnotes

[1] The P-5 Statute also requires that each participating school:

Establish a council composed of teachers, parents . . . school board members and community leaders to monitor and make recommendations to the school board concerning the school's educational programs.

Wis. Stat. § 115.45(4)(g)(1).

No. 01-1440

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JUANA VARGAS-HARRISON,
Plaintiff-Appellant,

v.

RACINE UNIFIED SCHOOL DISTRICT, DENNIS McGOLDRICK, JOHN PELEJ, et al.,
Defendants-Appellees.

March 25, 2002, Decided

JUDGES:

Before Hon. KENNETH F. RIPPLE, Circuit Judge, Hon. ILANA DIAMOND ROVNER, Circuit Judge, Hon. TERRENCE T. EVANS, Circuit Judge.

OPINION:

ORDER

Upon consideration of the Plaintiff-Appellant Juana Vargas-Harrison's petition for rehearing en banc, filed on December 14, 2001, no judge in active service * has requested a vote thereon and the judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing en banc is hereby DENIED.

Footnotes

* The Honorable John L. Coffey did not participate in the consideration of the suggestion for rehearing en banc.

Supreme Court, U.S.
FILED
JUL 23 2002
OFFICE OF THE CLERK

No. 01-1874

In The

Supreme Court of the United States

JUANA VARGAS-HARRISON,

Petitioner,

v.

RACINE UNIFIED SCHOOL DISTRICT, DENNIS McGOLDRICK, JOHN PELEJ, and PATRICIA STEPHENS-ROGERS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE ISSUES PRESENTED

Whether Petitioner, as the chief administrator of her school and a policy-making employee of Respondent School District, could be subject to demotion for engaging in speech critical of her supervisors' policies without implication or violation of her First Amendment rights?

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The parties to this action are those named in the caption. None of the parties is a non-governmental corporation requiring disclosure pursuant to Rule 29.6 of this Court.

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U.S. Const., First Amendment 8

STATEMENT OF THE CASE

The November 11, 1999 opinion of the United States District Court for the Eastern District of Wisconsin, included in Petitioner's Appendix (34a-72a), focused on the content of Petitioner's speech prior to her transfer to a vice-principal position; the February 9, 2001 Decision and Order addressed more specifically the policy-maker issue upon which the Petition is based. Pet. App., 17a-33a. Respondents suggest the summary of facts provided by the Court of Appeals is the most convenient explanation of the circumstances and events relevant to the Petition. Pet. App., 2a-7a. Respondents do not challenge any of the facts recounted in the opinions.

CLARIFICATION OF RECORD

Respondents submit that this case, as stated in Petitioner's presentation of the issues, Pet. App., 1, revolves around whether Petitioner was a "policy-maker" as that status is defined by decisions subsequent to *Pickering v. Board of Education*, 391 U.S. 503, 888 S. Ct. 1731, 20 L. Ed. 2d 811 (1968). Because much of Petitioner's Statement of the Case describes the school where Petitioner was principal, not her function as its leader and spokesperson *vis-a-vis* the Respondent School District and its highest managers, Respondent offers this summary of the facts demonstrating her policy-making status.

Petitioner Vargas-Harrison was the principal and highest administrator of the Gilbert Knapp Elementary School in Racine, Wisconsin. Like all Racine principals, she was the "representative of the Board and the Superintendent" who "implements the curriculum approved by the

Board" and "working with the staff, determines the organization structure of the building for instructions and assigns staff . . . accordingly," Pet. App., 20, discussing District Policy 2213c, ¶4, R.48. She had authority and discretion in the context of the school's organizational status, dealt with faculty selection, supervision, and evaluation, and controlled development of the school's curriculum and instructional methodology, *Id.*, 20.

An important duty of the principal at Knapp was the development of the school's application for a P-5 Program grant, one of the Wisconsin Educational Opportunity programs designed to subsidize assistance to minority and economically disadvantaged youth and adults, Wis. Stats., §115.28(23). Work on this grant application is to be accomplished through a community-developed specialty program which must include in its formulation the participation of parents, teachers, administrators, and neighbors of the school. *Id.*, §115.45(4)(g)1.

Each school is to develop and propose its own P-5 program, and in Racine that responsibility was assigned to the principal, Pet. App., 2a-3a. The School District viewed this program as both an educational opportunity for its students and a team-building opportunity for the larger school communities, as the statute mandated that the proposed plan "encourage and increase parental involvement in efforts to improve the quality of education." Wis. Stats., §115.45(4)(g)2.

Rather than use the Knapp P-5 proposal as a vehicle to improve the District's relations with teachers and their union, Petitioner introduced a totally new and different program which dramatically shifted funds away from teaching positions. The local teachers' union – as should

have been obvious to Petitioner – strongly objected to this change and the job losses it would engender, causing the District's Curriculum and Instruction ("C&I") Committee to reject her proposal. Pet. App., 3a.

Vargas-Harrison would not accept her supervisor's subsequent direction to collaborate with union officials, parents, and the school community in development of a new proposal which did not antagonize the union. Petitioner failed to participate in the meetings to create a new plan; rather, she pressed on with her original proposal. *Id.* When a group of teachers and parents, organized pursuant to the statute, reached consensus on a new proposal, Petitioner not only rejected their effort, but failed to attend their meetings as requested by District officials, and then spoke against their proposal at a public meeting of the C&I Committee. *Id.*, 3a-4a

Although the District superintendent's highest officers and the elected Board members wanted a proposal sponsored by Knapp's teachers, parents and administrators, Vargas-Harrison would not support that effort even after repeated direction that she do so. Instead, she told a public meeting of the C&I Committee that the new proposal was flawed, offered copies of her own plan as a preferred alternative, and thus attacked both her superiors and her teachers, the people with whom she was supposed to be developing a constructive relationship. By saying it "was time to let the principal do the job and stop the union running the school," Vargas-Harrison not only opposed, but actually undermined the collaboration which the District was seeking to develop. *Id.*

In total disregard of the District's determination to work with the teachers' union and the school's community,

Vargas-Harrison had contradicted the policy she had been directed to support and, in so doing, damned the faculty, the very people with whom every principal must work every day. Because of this, she was assigned a vice-principal position in a different school, with no loss of pay or benefits; this move would allow Knapp to recover from this confrontation and allow Petitioner to learn how to collaborate with the people she was to serve. Vargas-Harrison never went back to work, exhausted all of her accumulated paid and unpaid leave, and, some twenty months later, was notified that her failure to report for work over this extended period constituted a termination of the employment relationship.

REASONS FOR DENYING THE WRIT

As a policy-making employee of the School District, Vargas-Harrison was subject to correction for publicly opposing her supervisors' goals, plans, and directions. While *Pickering v. Board of Education*, 391 U.S. 563, 889, at 1731, 888 S. Ct. 1731, 20 L. Ed. 2d 811 (1968), generally protects a public employee's right to free speech, it also requires a balancing of that right with the employer's interest in an efficient work place. *Pickering* provided no protection when the "position in public employment in which the relationship between supervisor and subordinate is of such a personal and intimate nature that certain forms of public criticism of the supervisors by the subordinate would seriously undermine the effectiveness of the working relationship between them . . . " *Id.*, Fn. 3.

BECAUSE SHE WAS A "POLICY-MAKING EMPLOYEE," VARGAS-HARRISON WAS PROPERLY SUBJECT TO HER EMPLOYER'S NEGATIVE RESPONSES WHEN SHE PUBLICLY OPPOSED ITS DIRECTIONS AND POLICIES

There is no disagreement that Vargas-Harrison was a "policy-making employee." She was the highest administrative officer in her school, both the person responsible for its relationship with its faculty and community, as well as the officer assigned to use the P-5 proposal process as a vehicle to collaborate with those groups in the development of a grant application in which they all would share a sense of interest and commitment. Instead, Vargas-Harrison created a confrontation by unilaterally proposing a program which placed faculty employment positions at risk, causing serious opposition from the teachers' union with which she was supposed to cooperate. When this proposal was rejected, Petitioner declined to participate in meetings with teachers, union officials, and community members, disobeyed her supervisors' instructions that she support a more traditional grant application, and then publicly opposed both the new P-5 proposal and the labor relations policy she had been directed to accept and promote. This attack on the teachers' work, their union's activities, and her own supervisors' instructional and labor relations policies inevitably "would seriously undermine the effectiveness of the working relationship" she needed to maintain with the District's superintendent's office and board members.

Petitioner's extended and pointed opposition to the union-supported traditional P-5 program certainly reduced her effectiveness in dealing with her own faculty. More important in this context, her conduct also embarrassed

her superiors, making it most difficult to continue her principalship at Knapp if they were to be taken seriously in their efforts to cooperate with the teachers' union. The tension such conduct created was a significant barrier to efficiency at both the school and District levels of Petitioner's working relationships.

The basic rule is well-grounded in principle as well as precedent. In the patronage cases this court always excepted public contradictions by high level administrators from its prohibition of public employees being dismissed because of political affiliation with the opposing party. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 110 S. Ct. 2729, 111 L. Ed. 2d 52 (1990); thus, "support of patronage is the need for political loyalty of employees . . . to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate." *Elrod v. Burns*, 427 U.S. 347, 366, 96 S. Ct. 226, 49 L. Ed. 2d 547 (1976).

Branti v. Finkel, 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980), did not change this, but held the employer had the burden of proof in demonstrating that "an employee's private political beliefs would interfere with the discharge of his public duties, [so that] his First Amendment right may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency." 445 U.S., at 507, citing *Elrod*, 427 U.S., at 375. Every form of political administration must be able to depend on its cabinet and policy-makers to be a supportive part of its team; the alternative is the absurdity and paralysis which would occur "if every employment decision became a constitutional matter." *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983). This

empowerment of required consistency at the higher levels of a management team is reflected, for example, in the acknowledgement of the legitimate need for "an elected union president to select his own administrator [which] is an integral part of ensuring a union administration's responsiveness to the mandate of the union election," *Finnegan v. Leu*, 456 U.S. 431, 441, 102 S. Ct. 1867, 72 L. Ed. 2d 239 (1982) (local union president may dismiss predecessor's appointed business agents and choose his own staff without violating "rights of union members to freedom of expression," 456 U.S. 435).

Petitioner contends that the decisions of the United States Court of Appeals for the Seventh Circuit somehow pervert these very realistic elements of the *Pickering* balance. As the panel below wrote:

> "In essence, we have determined that, with respect to these employees, the Pickering analysis regularly will result in a determination that 'the government employer's need for political allegiance from its policy making employees outweighs the employee's freedom of expression to such a degree that it obviates Pickering balancing.' *Bonds v. Milwaukee County*, 207 F. 3d 969, 977 (7th Cir. 2000)." Pet. App. 9a.

Warzon v. Drew, 60 F. 3d 1234 (7th Cir. 1995) and *Wilbur v. Mahan*, 3 F. 3d 214, 219 (7th Cir. 1993) simply state the same principle excepted from *Pickering* in its third footnote: "The First Amendment does not prohibit the discharge of a policy-making employee when that individual has engaged in speech on a matter of public concern in a manner that is critical of superiors on their stated policies." Pet. App., 9a.

Vargas-Harrison does not present some bizarre or attenuated extreme of the principle preserved from challenge by *Pickering* and its progeny. This was a principal who was authorized and instructed to develop a curriculum proposal which both assisted her students and enlisted support from her teachers. Instead, Petitioner jeopardized teachers' jobs, attacked their union, and disobeyed her supervisors. She turned what should have been a collaboration into a bitter confrontation and a challenge to the authority of those Board and administration members it was her job to support. "When [what should have been] close working relationships . . . essential to fulfilling public responsibilities" are disrupted this much, "we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking [termination] action." *Connick v. Myers, supra*, at 151-152.

A policy-making employee has a different level of responsibility than someone who has no "input" toward ultimate decision making. By District regulation and by actual conduct, Vargas-Harrison was clearly in a position which "authorizes, either directly or indirectly, meaningful input into government decision making on issues where there is room for principled disagreement on goals or their implementation." *Nekolny v. Painter*, 653 F. 2d 1164, 1170 (7th Cir. 1981), Pet. App., 10a. As the person authorized to develop and present the P-5 grant application in a manner which enlisted union support, she had obvious "input into government decision making." In turning that project from a collaboration into a confrontation, she engaged in the very sort of insensitive, disruptive disobedience which this court excepted from First Amendment protections in

Connick, *Elrod*, and *Pickering* itself. The Seventh Circuit did not go off on some tangent or detour from precedent; it merely applied this court's definitional principles to the undisputed facts of this case. Vargas-Harrison went too far beyond her permissible discretion, and she was rightfully limited for doing so.

CONCLUSION

For the reasons set forth herein, Respondents respectfully request that this Court deny the Petition for Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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REPONDENTS' APPENDIX

Wis. Stats. 115.28(23) Wisconsin educational opportunity programs. Administer Wisconsin educational opportunity programs on a statewide basis to assist minority and economically disadvantaged youth and adults in pursuing higher education opportunities. The statewide programs shall consist of all of the following:

(a) A talent search program which shall provide information to youths and adults about postsecondary education and counseling to aid pupils in defining educational goals, applying and enrolling in postsecondary institutions and obtaining financial aid.

(b) A talent incentive program which shall provide supplemental aid to financially needy pupils to promote attendance at postsecondary institutions.

(c) An early identification program which shall provide services to pupils under s. 115.44.

(d) The minority group pupil scholarship program under s. 115.43.

* * *

Wis. Stats. 115.45 Grants for preschool to grade 5 programs. (4) The school board receiving an award under this section shall ensure that the schools or private service providers identified under sub. (2)(a) comply with all of the following requirements:

(a) Each identified school or private service provider shall provide structured educational experiences for 4-year-old pupils. The structured educational experiences

shall focus on the needs of low-income pupils and shall include activities that encourage early skill development.

(b) Each identified school or private service provider shall annually test the pupils enrolled in grades 1 to 5 in reading, language arts and mathematics using tests approved by the department.

(c) Each identified school or private service provider shall implement a multidisciplinary team approach to the identification and remediation of problems of pupils with significant needs.

(d) Each identified school or private service provider shall restrict class size in all grades below the 6th grade to no more than 25 pupils for each teacher.

(e) The principal of each identified school and the administrator of each identified private service provider shall annually prepare a written performance evaluation of each staff member providing services under this subsection.

(f) All administrative and instructional staff in the elementary grades of each identified school or private service provider shall participate in in-service training that focuses on educational practices and policies identified by the department as effective in improving pupil achievement.

(g) Each identified school shall:

1. Establish a council composed of teachers, parents of pupils enrolled in the schools district, school board members and community leaders to monitor and make recommendations to the school board concerning the school's educational programs.

2. Develop plans to encourage and increase parental involvement in efforts to improve the quality of education.

(h) Annually, each identified school or private service provider shall report to the state superintendent all of the following:

1. the results of the tests under par. (b).

2. the number and content of in-service training activities under par. (f).

3. the number and content of parental involvement activities and the number of parents attending each activity.

(3)

Supreme Court, U.S.
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No. 01-1874

In the

Supreme Court of the United States

JUANA VARGAS-HARRISON,

Petitioner,

v.

RACINE UNIFIED SCHOOL DISTRICT, DENNIS McGOLDRICK, JOHN PELEJ, and PATRICIA STEPHENS-ROGERS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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ISSUE PRESENTED

Did the U.S. Seventh Circuit Court of Appeals corollary principle obviating the ***Pickering*** balance limit First Amendment freedoms secured under ***Pickering v. Board of Education***, *391 U.S. 563, 888 S.Ct. 1731, 20 L.Ed.2d 811 (1968)*?

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INTRODUCTION

Petitioner filed a Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit in this matter on June 24, 2001. The Respondents filed their Brief in Opposition to the Petition for Writ of Certiorari. This is the Petitioner's Reply to the Respondents' Brief in Opposition to the Petition for Writ of Certiorari.

ARGUMENT

I. THE U.S. SEVENTH CIRCUIT COURT OF APPEALS, THE DISTRICT COURT, AND THE RESPONDENTS SIMPLY MISAPPREHEND THE IMPORTANCE OF THE *PICKERING* BALANCING MANDATED BY THE U.S. SUPREME COURT.

A. There Should Have Been a *Pickering* Analysis.

Does the U.S. Seventh Circuit Court of Appeals corollary principle obviating the ***Pickering*** balancing limit First Amendment freedoms secured under ***Pickering v. Board of Education***, *391 U.S. 563, 888 S.Ct. 1731, 20 L.Ed.2d 811 (1968).* The Respondents describe Petitioner as the highest administrator of Gilbert Knapp Elementary School in Racine, Wisconsin. Like all Racine Principals, she was the "representative of the Board and the Superintendent" who "implements the curriculum approved by the Board." (Res. Brief p. 1).

They seek to characterize the Petitioner as being an individual who did not use the Knapp P-5 proposal as a vehicle to improve the District relations with the teachers and their union. "Rather than using their P-5 proposal as a vehicle to improve the teachers' relations with their Union, the Petitioner introduced a totally new and different program which dramatically shifted funds away from teachers'

positions." (Res. Brief p. 2, ¶ 3). They now assert that Petitioner would not accept her supervisors, subsequent direction to collaborate with Union officials, parents, and school community in development of a new proposal which did antagonize the union. (Res. Brief p. 2, ¶ 3 and p. 3, ¶ 1).

The District Court and the U.S. Seventh Circuit Court of Appeals minimized the Petitioner's predicament. What was also at stake was the effectiveness of the P-5 program and its impact and relationship to the students. What the Courts below focus soley on was the projected disruptions which may have occurred by Petitioner's speech and its potential impact upon the Union because of the loss of jobs and that there was an undermining of "the collaboration which the District was seeking to develop" with the Union. (Res. Brief p. 3, ¶ 2).

Judge Randa, in his District Court Decision, recognized that predicament. (Pet. App. 26a, ¶ 1).

> The Court has some sympathy for the plaintiff's predicament. On the one hand, she was required to exercise a "strong leadership role" in the development of the P-5 program. On the other, she had to please her superiors, including ultimately the elected school board, and, in the background, the union. Given the political power wielded by teachers' unions today, it took courage for Vargas-Harrison to say publicly, in advocating her views on the P-5 program, that is was "time to...stop the union running the school." Reynolds Op., p. 7. However, the subject matter of the disagreement between Vargas-Harrison and the defendants, so long as it was a matter "of public concern," is not all that important. The Court's First Amendment analysis would be the same if Vargas-Harrison had opposed her superiors (and the union, presuming that it took the same position) on sex education,

> prayer in the classroom, or the teaching of evolution. What matters is the nature of the plaintiff's job and whether it afforded her "meaningful input" into the formulation of the disputed policy. It is clear that Vargas-Harrison, by statute and regulation, held a position that authorized "meaningful input into government decisionmaking on issues where there [was] room for principled disagreement on goals or their implementation." ***Nekolny***, *653 F.2d at 1170.* Thus, even if the defendants did reassign or terminate Vargas-Harrison for opposing them (and the union) on the P-5 program, they did not violate her rights under the First Amendment. In other words, because Vargas-Harrison was a policymaking employee, her supervisors could, consistent with the First Amendment, fire her "for advocating positions in conflict with their stated policies." ***Warzon***, *60 F.3d at 1239.*

What the Respondent now asserts is that in the Petitioner's Statement of the Case is that the focus should be not on the Petitioner as Principal, but rather on her functions as its leader and spokesperson for the Superintendent and the Respondent School District as its highest manager.

The Respondents and the courts below concerned themselves with the functional impact and/or effect of Petitioner's speech on the relationships with the Union and the superiors. No where in their analysis is there any concern about the impact of her speech on the effectiveness of the P-5 program and its impact on the students. This is precisely why the ***Pickering*** balancing is the appropriate standard because the Court should not only weigh the impact and effects of the speech on the superiors and the Union, but it must weigh the importance of the speech on the P-5

program as it relates to the P-5 program's affect on the students. What if Petitioner was right in her assertions that the previous P-5 proposal had flaws and was detrimental to the students? Should she be punished for advocating the best approach for the students as the instructional leader of the school? Does Petitioner's speech relating to the effectiveness and impact of the P-5 program on students have any relationship or any importance in this analysis? The Seventh Circuit says implicitly it does not. (Pet. App. 13a, ¶ 1).

Assuming arguendo that the Respondents are correct, (however, the Petitioner does not concede this point), that Petitioner told the public meeting of the C&I Committee that the new proposal was flawed, offered copies of her own plan as a preferred alternative, and, thus, attacked both her superiors and her teachers (which she did not) actually happen. The court below still does not deal with the speech as it relates to a matter of public concern - that is, whether her speech concerning the improvement of the educational plight of low economic and disadvantaged students should be adequately debated. What the Seventh Circuit is saying, in effect, is that even if one is speaking on a sensitive issue, that is, the education plight of low economic minorities and disadvantaged students, if there are conflicts with Union harmony, then there is no free speech protection for the speaker. That is precisely why there is a need for the ***Pickering*** balancing.

B. All Other Circuits Followed *Pickering* Strictly.

In ***Lewis v. Cowen***, *165 F.3d 154*, the Second Circuit Court of Appeals applied the ***Pickering*** balancing test when the Plaintiff-Appellant (the employee) refused to follow the directive of his supervisor requiring that there be a modification in the Connecticut State Lottery. The directive was that the lottery games were going to be changed subject to the ultimate approval of the board. The Plaintiff-Appellant

disagreed with his superior. ***Lewis***, *165 F.3d at 158 and 159.* The Second Circuit indicated after a ***Pickering*** balancing that as a matter of law that the Defendant's interest in the effective and efficient operation of the division outweighed the Plaintiff-Appellant's First Amendment interests in refusing to present the proposed changes before the board in a positive manner. ***Lewis***, *165 F.3d 154 ¶ 24.* It is noteworthy that this was done by doing a ***Pickering*** balancing analysis.

In ***McEvoy v. Spencer***, *124 F.3d 92 (1997)*, Police Commissioner McEvoy "publicly and in house" expressed his opinion that the prior Commissioner had permitted excessive and unnecessary overtime payments to police officers and the Department had been grossly mismanaged. McEvoy was subsequently demoted following a previous election and then alleged that there was a conspiracy to demote him to Deputy Chief and that his First Amendment rights were violated. McEvoy indicates that:

> Where the evidence shows that the employer discharged a policy-maker solely for speaking out on a matter of public concern, and that the policy-maker's political beliefs played no role in the employer's decision, ***Elroy*** is inapplicable and ***Pickering*** must be applied, although how it should be applied remains for consideration.

McEvoy summarized the status of the law:

> In sum, although the Supreme Court has ruled that the policymaking status of an employee is relevant to the ***Pickering*** analysis, it has never stated that the discharged employee's position in the employment hierarchy would automatically tilt the ***Pickering*** balance in the employer's favor. ***McEvoy***, *124 F.3d 92 at 102.* We therefore read ***Pickering*** and its

progeny as holding that the policymaking status of the discharged or demoted employee is very significant in the ***Pickering*** balance, but not conclusive. That the nature of the employee's position is important to the free speech balancing test should not be surprising. Common sense tells us that the expressive activities of a highly placed supervisory, confidential, policymaking, or advisory employee will be more disruptive to the operation of the workplace than similar activity by a low level employee with little authority or discretion. *See, e.g.,* ***Bates v. Hunt****, 3 F.3d 374, 378 (11th Cir. 1993).*

The Second Circuit concluded that:

We now rule, consistent with our understanding of ***Pickering*** and ***Kaluczky***, that in a pure ***Pickering*** case, an employee's policymaking role does not provide an employer with complete insulation for adverse employment action, but does weigh, normally heavily, on the employer's side in the ***Pickering*** balance. ***McEvoy****, 124 F.3d 92, 103.*

What the Second Circuit did in ***McEvoy*** and in ***Lewis*** was that they never obviated the need for a ***Pickering*** analysis. The Seventh Circuit is the only Circuit which has obviated the need for a ***Pickering*** analysis.

C. The Debate Was Programing Versus Funding Allocation; It Was Not Political.

The late Judge Reynolds in his Decision and Order denying the Plaintiff's Motion for Preliminary Injunction (Pet. App. 34a) succinctly identifies the dispute in the proposal (Pet. App. 49a and 50a). Judge Reynolds suscinctly summarized the conclusion in denying the Preliminary Injunction:

> The balancing of interests weighs in favor of Vargas-Harrison. Vargas-Harrison, as principal, was given the responsibility to spearhead the P-5 proposal process under the P-5 Statute, and she had inside information on the needs of her school. Of course, the District was concerned that given Vargas-Harrison's opposition to the Union's P-5 proposal, and her alienation of the Union, she would not be able to effectively perform her duties at Knapp. But the District knew of Vargas-Harrison's efforts, and encouraged them, but did not stand behind Vargas-Harrison when she was opposed by the Union Director Ennis.

Moreover, Judge Reynolds did the balancing of harm and the public interest. With respect to the public interest, Judge Reynolds stated:

> The public interest lies on both sides of this dispute. Encouraging debate on important issues of school programming and funding...

Judge Reynolds correctly expressed the public interest. Judge Reynolds clearly summarizes the debate. (Pet. App. 37a)

> In Wisconsin, public education is financed by property taxes (nearly 40 percent), state aid (nearly 60 percent), and federal aid (less than five percent). The state has increased state aid dramatically in the past fifteen years, but to "control costs" (i.e., to prevent property taxes from going up), the state has placed a cap on amounts schools can spend, which amounts can be exceeded only by approval of a local referendum. In addition, the state has appropriated funds for P-5 programs, which funds go directly to school districts. The P-5 program funds can be used for jobs - which the teacher union wanted - or for other educational which Vargas-Harrison wanted. The fight over jobs (in this case, three) versus educational programs is what gave rise to the dispute between the parties. (Emphasis Added.)

> In the present case, Vargas-Harrison, believed (and said so) that Gilbert Knapp Elementary School's On-site Advisory Counsel was not established and did not function in accordance with the P-5 Statute and the directives of the State Superintendent of Public Instruction. The court finds that Vargas-Harrison was correct in this belief (although the correctness does not matter for present purposes) and was retaliated against for expressing her views. (Pet. App. 37a, ¶ 3; App. 38a).

As the instructional leader, the Petitioner focused on the effectiveness of the Program and its relationship to the students. Petitioner's speech may have interfered or antagonized the union. But for the antagonism, the plight of the students may have suffered.

CONCLUSION

The core principal case that the Seventh Circuit relied upon is ***Warzon***, which stands for the proposition:

> A policy-making employee can terminate an employee consistent with the First Amendment, fire her "for advocating positions in conflict with their stated policy. ***Warzon***, *60 F.3d 1239*. (Pet. App. 27a).

Judge Reynolds concluded, rightly, that there was a clearly identifiable policy in ***Warzon***. In the instant case:

> Neither party definitively explained what Defendants policy was and whether such a policy was stated within the meaning of the policy-making employee exception. (Pet. App. 71a, ¶ 1).

Moreover, there reliance upon ***Bonds v. Milwaukee County***, *207 F.3d 969 (2000)* is further expanded. At least, in ***Bonds***, the Seventh Circuit and the court below did a detailed analysis of ***Pickering***. In the instant case, there is no comprehensive analysis of ***Pickering***. The U.S. Supreme Court should determine the contours of ***Pickering*** and whether the expansion of ***Pickering*** by this decision and ***Bonds*** is warranted.

In the instant case, there was no ***Pickering*** balance. For this reason, Certiorari should be granted.

Respectfully submitted,

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